WISCONSIN JURY INSTRUCTIONS

CIVIL

VOL. II

WISCONSIN
CIVIL
JURY INSTRUCTIONS
COMMITTEE

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WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME II

Wisconsin Civil Jury Instructions Committee

University of Wisconsin Law School

- With 2020 Supplement

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1500 CAUSE

In answering question(s) _____, you must decide whether someone's negligence caused the (accident) (injury). (This) (These) question(s) (does) (do) not ask about "**the** cause" but rather "**a** cause" because an (accident) (injury) may have more than one cause. Someone's negligence caused the (accident) (injury) if it was a substantial factor in producing the (accident) (injury). An (accident) (injury) may be caused by one person's negligence or by the combined negligence of two or more people.

COMMENT

This instruction was originally approved in 1989. It was revised in 1999 and 2005. The 2005 version attempts to express the instruction in simpler language.

This instruction is based on Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 236-38, 55 N.W.2d 29 (1952), and Osborne v. Montgomery, 203 Wis. 223, 242, 234 N.W. 372 (1931). It was approved in Ayala v. Farmers Mut. Auto Ins. Co., 272 Wis. 629, 639-40, 76 N.W.2d 563 (1956).

In Wisconsin, the test for whether negligence was causal is whether that negligence was a "substantial factor" in causing the injuries. Merco Distributing Corp. v. Commercial Police Alarm Co., Inc., 84 Wis.2d 455, 267 N.W.2d 652 (1978); see also Steinberg v. Jensen, 204 Wis.2d 115, 553 N.W.2d 820 (Ct. App. 1996). It is erroneous to instruct a jury that they must find that the negligence was "the" substantial factor in causing injury. Reserve Supply Co. v. Viner, 9 Wis.2d 530, 101 N.W.2d 663 (1960). In Steinberg v. Jensen, supra, the jury sent a note to the trial court asking: "With the cause question, do we all or only 10 to 2 majority, have to agree on the specific cause. It is sufficient for each of us to have some cause attributed to Dr. Jensen?" The trial judge gave the following supplemental instruction: "Specifically to your question the answer to that is no, not all have to agree but rather a 10 to 2 majority must agree and you must agree on a specific cause in that regard but the numbers are 10 to 2." On appeal, the court of appeals said that although the supplemental causation instruction did not use the term "the substantial factor in causing injury," the instruction implied that the jurors must agree that the negligence was "the cause," rather than "a cause." The use of the term "specific cause" informed the jury that they must agree on a particular, single, exclusive cause in order to answer "yes" to the causation question. The court said that instructing the jury in this manner resulted in a misstatement of the law regarding causation.

Intervening Cause. Where an intervening (superseding) cause allegedly produced by another is interposed as a defense by a defendant charged with the first act of negligence, the jury is first required to find whether the found negligence of such first actor was a substantial factor in causing the accident on which liability is sought to be predicated. See Pfeifer, supra. If the jury finds the negligence of the first actor is a substantial factor, then the defense of intervening cause is unavailing unless the court determines that there are policy factors which should relieve the first actor for liability. Ryan v. Cameron, 270 Wis. 325,

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331, 71 N.W.2d 408 (1955); Restatement, Second, Torts § 447 (1934); Campbell, "Law of Negligence in Wisconsin," 1955 Wis. L. Rev. 1, 40.

Public Policy Factors. In 2004, the Wisconsin Supreme Court reviewed the history behind the application of the six public policy factors used to preclude tort liability and the relationship between "public policy" and "proximate cause." Mackenzie Fandrey v. American Family Mut. Ins. Co., 2004 WI 62, 272 Wis.2d 46, 680 N.W.2d 345. The court said that when "public policy" is used in the context of precluding liability, that term is being used as a *synonym* for "proximate cause." The supreme court noted that the term "proximate cause" referred to two distinct concepts. The first use of the term was to describe "limitations on liability and on the extent of liability based on lack of causal connection in fact." The second use of "proximate cause" was to describe limitations on liability and on the extent of liability based on public policy factors making it unfair to hold a party liable for tort damages.

The court said that the first use on meaning of "proximate cause" has long been abandoned in Wisconsin in favor of the "substantial factor" test used to establish cause-in-fact, which is a jury issue. The court then noted that the second use and meaning of "proximate cause" still remains a part of Wisconsin's legal cause analysis. After reviewing a series of decisions addressing terms such as "cause-in-fact," "legal cause," "proximate cause," and "public policy factors," the court wrote in a footnote:

> "Fn 7. This discussion is not intended as an invitation to reintroduce the term 'proximate cause' into Wisconsin's legal lexicon or to alter the current state of Wisconsin's tort jurisprudence. Rather, this discussion represents an accurate historical analysis of Wisconsin's use of the term 'proximate cause' in relation to public policy factors. We are simply recognizing that what has previously been labeled as 'proximate cause,' i.e. the second step in the legal cause analysis, is now referred to as 'public policy factors.' This concept has not changed; only the label has done so. We emphasize that this opinion does nothing to change Wisconsin's common law relating to duty, breach, and cause in negligence claims. Once it is established that a plaintiff's negligence was a substantial factor in producing an injury, the only limitation on liability is public policy factors--what was previously referred to as 'proximate cause.' We use the terms 'proximate cause' and 'public policy factors' interchangeably only because, historically, Wisconsin courts have used these terms interchangeably."
>
> In a concurring opinion, Justice Bradley addressed the above quoted footnote as follows:
>
> ¶ 45. The majority, at times, uses the terms "proximate cause" and "public policy" interchangeably. This may leave the reader wondering about the continued vitality of using proximate cause to limit liability. Footnote 7, however, provides the answer. Simply put, in Wisconsin we use public policy factors, not proximate cause, to limit liability.

Cause of Collision v. Cause of Injury. In submitting the cause question relating to a nondriver plaintiff (following a contributory negligence question), the inquiry is usually whether the negligence is a cause of plaintiff's injuries (or damage) rather than whether it is a cause of the collision. Causation of injury is the ultimate fact in every case but between drivers, the negligence causing the collision necessarily causes the injuries arising therefrom and so an inquiry as to "cause of the collision" is proper as between drivers as it is also in the rarer cases between a driver and the active negligence of the nondriver. Scory v. LaFave, 215 Wis. 21, 37, 254 N.W. 643 (1934); Weise v. Polzer, 212 Wis. 337, 345 N.W. 113 (1933). On distinction of

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active and passive negligence of a passenger as related to the cause question, see Theisen v. Milwaukee Auto Ins. Co., 18 Wis.2d 91, 105, 118 N.W.2d 140 (1962), and McConville v. State Farm Mut. Auto Ins. Co., 15 Wis.2d 374, 385, 113 N.W.2d 14 (1962).

Lookout and failure to warn on the part of a guest may in exceptional cases be a substantial factor or a cause of the collision or accident, but ordinarily such negligence is not, although it may be, a cause of his or her injuries. Theisen v. Milwaukee Auto Ins. Co., supra.

If there is more than one cause, it is prejudicial error to say "the cause" instead of "a cause." Reserve Supply Co. v. Viner, 9 Wis.2d 530, 533, 101 N.W.2d 663 (1960). See also Clark v. Leisure Vehicles, Inc., 96 Wis. 2d 607, 292 N.W.2d 630 (1980).

If there is no issue of comparative negligence, it is preferable to use the term "the cause" instead of "a cause." Spleas v. Milwaukee & Suburban Transp. Corp., 21 Wis.2d 635, 639, 124 N.W.2d 593 (1963). In this instance, eliminate sentences 2 and 3 of the instruction.

The supreme court will follow the substantial factor concept of causation under which there may be several substantial factors contributing to the same result. Sampson v. Laskin, 66 Wis.2d 318, 326, 224 N.W.2d 594 (1975). See also Morgan v. Pennsylvania Gen. Ins. Co., 87 Wis.2d 723, 275 N.W.2d 660 (1979).

It need not be the sole factor, the primary factor, only a substantial factor. Schnabl v. Ford Motor Co., 54 Wis.2d 345, 353-54, 195 N.W.2d 602, 198 N.W.2d 161 (1972).

It is not important that the defects alleged did not cause the initial accident as long as they were a substantial factor in causing injury. Arbet v. Gussarson, 66 Wis.2d 551, 557, 225 N.W.2d 431 (1975). See also Sumnicht v. Toyota Motor Sales, 121 Wis.2d 338, 360 N.W.2d 2 (1984).

The word "substantial" is used to denote the fact that conduct has such an effect in producing the harm as to lead a reasonable person to regard the conduct as a cause of the harm, using the word "cause" in the popular sense in which there always is implicit the idea of responsibility. Retzlaff v. Soman Home Furnishings, 260 Wis. 615, 620, 51 N.W.2d 514 (1952).

The cause may be differently expressed in specific situations. See, for example, Wis JI-Civil 1023.3 Cause in Medical Malpractice—Informed Consent Cases.

Policy Factors. Policy factors may be applied by the court to limit liability for remote, extraordinary, highly unusual, or conscience-shocking results of harm. Farmers Mut. Auto Ins. Co. v. Gast, 17 Wis.2d 344, 117 N.W.2d 347 (1962); Dombrowski v. Albrent Freight & Storage Corp., 264 Wis. 440, 446, 59 N.W.2d 465 (1953); Pfeifer v. Standard Gateway Theater, Inc., supra at 238-39; O'Connell v. Old Line Life Ins. Co., 227 Wis. 671, 673-74, 278 N.W. 458 (1938); Osborne v. Montgomery, supra at 237; Kerwin v. Chippewa Shoe Mfg. Co., 163 Wis. 428, 431-33, 157 N.W. 1101 (1916); Habrouck v. Armour & Co., 139 Wis. 357, 366, 121 N.W. 157 (1909); Parnell, "Causation," Feb. 1957 Wis. Bar Bull. 17.

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1505 CAUSE: WHERE CAUSE OF DEATH IS IN DOUBT

(Name) was injured in the accident which occurred on (date) and (he) (she) died on (date). Question _____ asks whether the injuries sustained in the accident were a cause of (name)'s death. The question asks whether the injuries sustained in the accident were "a cause" rather than "the cause" of the death because there may be more than one cause of death. Before you may find that the injuries sustained in the accident were a cause of (name)'s death, you must find that the injuries were a substantial factor in causing the death.

COMMENT

This instruction and comment were approved in 1969 and revised in 1998.

In cases involving death, the causal relation between the injuries sustained and the death may be at issue. This instruction submits the issue to the jury as to the causal relationship. See Peters v. Zimmerman, 275 Wis. 164, 172, 81 N.W.2d 565 (1957); Merkle v. Behl, 269 Wis. 432, 436, 69 N.W.2d 459 (1955).

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1506 CAUSE: RELATION OF A MEDICAL PROCEDURE TO THE ACCIDENT

Question _____ asks whether the injury sustained in the accident on (date) was a cause of the (medical procedure). The question asks whether the injury was "a cause" rather than "the cause" of the (medical procedure). There may be more than one cause of a (medical procedure). To find that the injury sustained in the accident was a cause of the (medical procedure), you must be satisfied that the injury was a substantial factor in producing the medical condition which made the (medical procedure) a medical necessity.

COMMENT

This instruction and comment were originally approved in 1967. The instruction was revised in 1998.

This instruction is a modification of the instruction approved in Chapnitsky v. McClone, 20 Wis.2d 453, 122 N.W.2d 400 (1963), and, inferentially, again approved in Ide v. Wamser, 22 Wis.2d 325, 126 N.W.2d 59 (1964). In the typical negligence cases, this instruction, and the question at which it is directed, will not be used, for in such cases, causation — the relationship between physical and mental injuries and the accident — is taken care of in the damage question or questions and their applicable instructions, e.g.:

> . . . to fairly and justly compensate the person named in the question for the personal injuries or damages resulting to him as a natural consequence of the collision. Wis JI-Civil 1705, Burden of Proof in Tort Actions.

See also Wis JI-Civil 1715 and Wis JI-Civil 1720.

Although the court in Chapnitsky, and later in Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981), notes that an instruction and special fact causation question as to whether particular injuries of the plaintiff were caused by the accident were not recommended in the typical personal injury litigation, it does recognize their propriety and advisability where:

> (1) Plaintiff's damages resulting from an accident would be minimal unless a particularly serious mental or physical condition was also caused by the accident, and
>
> (2) There is sharp conflict in the testimony as to whether such serious condition was caused by the accident. Chapnitsky v. McClone, supra at 463-64; Johnson v. Ray, supra at 787.

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See also John A. Decker & John R. Decker, "Special Verdict Formulation," 60 Marq. L. Rev. 201, 264 (1977).

The instruction is not to be used in cases where either of two events, standing alone, would have been adequate to cause the injurious result. Chapnitsky v. McClone, supra at 464-66.

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1510 NEGLIGENT INFLICTION OF SEVERE EMOTIONAL DISTRESS (BYSTANDER CLAIM)

(Plaintiff) claims injury for severe emotional distress caused by [directly observing the (incident) (accident) which (seriously injured) (killed) _____] [coming upon the scene immediately after the (incident) (accident) and witnessing the aftermath of the (serious injury) (death) to _____].

If your answers to question 1 and question 2 of the verdict are "yes" [regarding the underlying (incident) (accident) involving _____ and (defendant), _____], then you must consider (plaintiff)'s claim of severe emotional distress.

Question ___ asks whether (plaintiff) suffered severe emotional distress.

Emotional distress may arise from the natural shock and grief of directly observing an (incident) (accident) which results in the (serious injury) (death) to a family member or from coming upon the scene minutes later and witnessing the aftermath. Emotional distress includes mental suffering, anguish, and shock. It can include fright, horror, grief, and worry. It need not include physical manifestations of injury, although these may also be present.

In order for (plaintiff) to recover, however, (his) (her) emotional distress must be severe. This means it must be more than temporary discomfort or a minor psychic or emotional shock. It must be an extreme emotional response.

Question ___ asks whether (defendant)'s negligence in the underlying (incident) (accident) was a cause of (plaintiff)'s emotional distress. Note that you are not to answer this question unless you answered the preceding question "yes."

The cause question asks whether there was a causal connection between (defendant)'s negligence in the underlying (incident) (accident) and (plaintiff)'s emotional distress. The

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question does not ask about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of an injury. The negligence of one person may cause an injury or the combined negligence of two or more persons may cause it. Before you find that (defendant)'s negligence in the underlying (incident) (accident) was a cause of plaintiff's emotional distress, you must find that (defendant)'s negligence was a substantial factor in producing (plaintiff)'s emotional distress.

Question ___ asks what sum of money, if any, will fairly and reasonably compensate (plaintiff) for the severe emotional distress. Note that you are not to answer this question unless you answered the previous question "yes."

In answering [these verdict questions] [verdict question _____] you should not consider the harm that naturally flows from the loss of a family member. Rather, the damages for emotional distress, if any, must arise solely from (plaintiff)'s observing the [describe incident].

[Include Relevant Instructions on Damages.]

SPECIAL VERDICT

Question ___: Did the plaintiff, _____, suffer severe emotional distress?

Answer: _____

Yes or No

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If you answered the previous question "yes," answer this question:

Question ___: Was (defendant)'s negligence in the underlying (incident) (accident) a cause of (plaintiff)'s emotional distress?

Answer: _____
Yes or No

Question ___: What sum of money, if any, would fairly and reasonably compensate (plaintiff) for severe emotional distress?

(a) [indicate type of damages]

Answer: _____

(b) [indicate type of damages]

Answer: _____

(c) [indicate type of damages]

Answer: _____

COMMENT

This instruction and comment were approved by the Committee in 1996 and replaced the prior version which was based on the zone of danger rule. The instruction was revised in 2006. The comment was updated in 2001, 2003, 2004, 2005, 2006, 2010, and 2014.

For a direct claim based on negligent infliction of emotional distress, see Wis JI-Civil 1511.

This instruction is based upon the principles enunciated in Bowen v. Lumbermens Mut. Casualty Co., 183 Wis.2d 627, 517 N.W.2d 432 (1994). It is limited to one type of negligent infliction of emotional distress: severe emotional distress suffered by a bystander who witnesses an accident or the gruesome aftermath of an accident involving serious or fatal injuries to a close relative. The court set out the requirements of the claim of negligent infliction of emotional distress to a bystander as follows: "(1) that the defendant's conduct [in the underlying accident] fell below the applicable standard of care, (2) that the plaintiff suffered an injury [severe emotional distress], and (3) that the defendant's conduct was a cause-in-fact of the plaintiff's injury." Id. at 632. See also Rabideau v. City of Racine, 2001 WI 57, 243 Wis.2d 486, 627 N.W.2d 795.

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The Bowen court set out three public policy limitations on this claim: "First, the injury suffered by the victim must have been fatal or severe. Second, the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild, or siblings. Third, the plaintiff must have observed . . . the incident and injury or the scene soon after the incident with the injured victim at the scene." Id. at 633. In addition, borrowing from the tort of intentional infliction of emotional distress, the court limited the compensable injury to emotional distress that is severe.

The Bowen court struck down three prior legal principles involving negligent infliction of emotional distress to a bystander: (1) the concept of "zone of danger"; (2) the requirement that a plaintiff be in fear for his or her own safety; and (3) that the emotional distress be evidenced by physical manifestations.

This instruction recognizes that the claim for emotional distress to the plaintiff-bystander will normally be joined with an underlying claim involving the victim's serious injuries or death. Therefore, the emotional distress claim is premised on answers to previous questions that show the defendant's causal negligence with respect to the underlying accident. The instruction directs the jury to consider the claim for negligent infliction of emotional distress if the jury's answers to those questions were "yes."

If the plaintiff's claim for emotional distress is brought separate from a claim by or on behalf of the victim, the Committee believes that questions of negligence and cause with respect to the underlying incident or accident nevertheless must be asked as part of this claim.

This instruction also presumes that the trial judge has considered the three public policy limitations on this tort set out above. The Committee believes that these public policy limitations are legal cause questions for the trial judge and not questions for the jury.

In addition to these limitations, the Bowen court noted that other public policy considerations must be examined on a case-by-case basis either before trial by summary judgment or motion to dismiss or after trial "when the issues are complex or the factual connections attenuated, . . ." Id. at 655. The court set out six separate public policy considerations leading up to the ultimate question of whether liability in a given case would "shock the conscience of society." Id. at 656:

> (1) whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears too extraordinary that the negligence would have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or (6) whether allowance of recovery would enter a field that has no sensible or just stopping point. Id. at 655.

Comparative Negligence. There is no Wisconsin case law on whether a bystander recovery is reduced by the contributory negligence of the victim. The committee believes that if the jury finds contributory negligence, then a plaintiff's recovery should be reduced according to the jury's apportionment of comparative negligence. See Portee v. Jaffee, 84 N.J. 88, 101-02 (1980); State v. Eaton, 101 Nev. 705, 714-15, 710 P.2d 1370 (1985). In addition, it may also be proper to include any negligence by plaintiff (e.g. negligent supervision) in the comparative negligence apportionment.

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Damages. The last paragraph was added in 2006 to avoid overlapping damages, e.g., wrongful death elements. See Wis JI-Civil 1880 and 1897.

Loss of Pet and Property Damage. In Rabideau, supra, the Wisconsin Supreme Court held that the rule of nonrecovery for the injury or death of a nonfamily member applies with equal force to a plaintiff who witnesses as a bystander the negligent injury or death of a best friend who is human as it does to a plaintiff whose best friend is a dog.

The supreme court rejected a claim of negligent infliction of emotional distress arising out of negligent damage to property after an examination of the claim under the six public policy considerations reviewed in Bowen and set forth above. Kleinke v. Farmer's Coop. Supply & Shipping, 202 Wis.2d 138, 549 N.W.2d 714. In Bowen, the court also refused to permit the dog's owner to maintain a claim for negligent infliction of emotional distress arising from property loss. Bowen, supra ¶ 27.

Medical Negligence Claims. In Phelps v. Physicians Insurance Co. of Wisconsin, Inc., 2009 WI 74, 319 Wis.2d 1, 768 N.W.2d 615, the supreme court held that Wis. Stat. Ch. 655 does not permit bystander claims for negligent infliction of emotional distress arising from medical malpractice of health care providers and their employees.

In Pierce v. Physicians Ins. Co. of Wis., the Wisconsin Supreme Court held that a mother who suffers the stillbirth of her infant as a result of medical negligence has a personal injury claim involving negligent infliction of emotional distress, which includes the distress arising from the injuries and stillbirth of her daughter, in addition to her derivative claim for wrongful death of the infant. Pierce, 2005 WI 14, 278 Wis.2d 82, 692 N.W.2d 558, ¶1. In Pierce, the court also stated that when Bowen rejected Waube's "Zone of danger rule," it did not undermine Westcott, 148 Wis.2d 239. The court said it continues to recognize a claim for negligent infliction of emotional distress where the claimant is directly involved in the tortious activity. Bowen did nothing to change this. Pierce, supra ¶17.

Claim Based on Media Broadcast. A plaintiff does not have a claim against a media defendant for negligent infliction of emotional distress if the contents of the broadcast were not false or defamatory. Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.

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1511 PERSONAL INJURIES: NEGLIGENT INFLICTION OF SEVERE EMOTIONAL DISTRESS (SEPARATE OR DIRECT CLAIM)

(Plaintiff) has alleged that (he) (she) sustained severe emotional distress as a result of the (accident) (incident) involved in this case [independent of (his) (her) claim of physical injuries] [in the absence of physical injuries.] Emotional distress is compensable with or without physical injuries if (defendant) was negligent with respect to the (accident) (incident) involved in the case, the (accident) (incident) caused the (plaintiff) emotional distress, and the emotional distress is severe. Therefore, there are three things that (plaintiff) must prove by the greater weight of the credible evidence to a reasonable certainty:

1. (defendant) was negligent with respect to the (accident) (incident) involved in the case;
2. the (accident) (incident) was a cause of (plaintiff)'s emotional distress; and
3. the emotional distress is severe.

First, as to negligence:

INSERT INSTRUCTION ON NEGLIGENCE (WIS JI-CIVIL 1005)

Second, as to emotional distress, "emotional distress" is sometimes referred to as mental suffering or mental anguish. [It is sometimes described as post-traumatic stress disorder.] It includes all highly unpleasant mental reactions such as fright, grief, anger and worry, and it may include physical manifestations of emotional distress such as nausea, insomnia, and hysteria.

However, in order for emotional distress to be an independent or direct legal claim, the emotional distress must be severe. Complete emotional tranquility is seldom attainable

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in this world, and some degree of emotional distress is part of the price of living among other people. The law permits a claim for emotional distress separate from physical injuries or in the absence of physical injuries only where the emotional distress is so severe that no reasonable person could be expected to endure it.

Third, as to cause:

INSERT INSTRUCTION ON CAUSE (WIS JI-CIVIL 1500)

If you are satisfied from the evidence that (defendant) was negligent with respect to the (accident) (incident) involved in this case; and the (accident) (incident) was a cause of emotional distress to (plaintiff), and the emotional distress was severe, you should award fair and reasonable compensation for the claim of severe emotional distress. If you are not satisfied, make no allowance for the claim of severe emotional distress and confine your award to fair and reasonable compensation for any other injuries to (plaintiff) which were caused by the (accident) (incident).

COMMENT

This instruction and comment were approved in 2005. The comment was updated in 2006 and 2018.

Overview. This comment should be read together with the comment to Wis JI-Civil 1510, "Negligent Infliction of Emotional Distress (Bystander Claim)." Together these comments provide assistance in understanding negligent infliction of emotional distress both historically and conceptually. As with Wis JI-Civil 1510 which follows the Bowen framework for a bystander claim, this instruction follows the Bowen framework for a separate or direct claim of negligent infliction of emotional distress. Bowen v. Lumbermens Mut. Casualty Co., 183 Wis.2d 627, 517 N.W.2d 432 (1994). See also Camp v. Anderson, 2006 WI App 170, 295 Wis.2d 714, 721 N.W.2d 146; Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797.

The tort of negligent infliction of emotional distress was discussed at length in Bowen. The Bowen court recognized that "[m]yriad circumstances may give rise to claims for negligent infliction of emotional distress." Id. at 631. The court outlined the elements of the claim as: "(1) that the defendant's conduct fell below the applicable standard of care, (2) that the plaintiff suffered an injury, and (3) that the defendant's conduct was a cause-in-fact of the plaintiff's injury." Id. at 632. Borrowing from the tort of intentional infliction of emotional distress, Alsteen v. Gehl, 21 Wis.2d 349, 124 N.W.2d 312 (1963), the Bowen court

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indicated that "in a cause of action for negligent infliction of emotional distress the injury a plaintiff must prove is severe emotional distress; but the plaintiff need not prove physical manifestations of that distress." Id.

Therefore, the framework for a claim of negligent infliction of emotional distress follows the traditional rules applicable to negligence claims, i.e., "negligent conduct, causation and injury (here severe emotional distress)." Id. at 652. Nevertheless, the claim has proven and continues to prove troublesome to the courts. As stated in Bowen at 637-38:

> The tort of negligent infliction of emotional distress has troubled this court and other courts for many years. . . . Historically, this court and other courts have been reluctant to compensate plaintiffs for emotional suffering. While courts are willing to compensate emotional harm incident to physical injury in a traditional tort action, they have been loath to recognize the right to recover for emotional harm alone. The common law traditionally distrusted emotion. Emotional suffering was deemed genuine and compensable only if it was associated with a provable physical injury claim in an accepted tort cause of action.

One of the major reasons for the historical distrust of claims for emotional harm is the difficulty with authenticating such claims. The Bowen court considered this difficulty and concluded that the traditional framework of negligent conduct, cause and injury coupled with public policy considerations would sufficiently protect against spurious or feigned claims. (see, Bowen at 655).

Development of the law. The Bowen court traced the development of the tort of negligent infliction of emotional distress. The court pointed out that the law has long permitted a claim for emotional suffering if it is a component of a claim for physical injury sustained in an accident. Emotional harm associated with physical injuries is defined in Wis JI-Civil 1767 as "worry, distress, embarrassment and humiliation."

From 1935 until 1984, the Supreme Court struggled with the doctrinal rule that compensable emotional harm had to accompany physical injuries. The so-called "impact rule" was replaced by the "zone of danger" rule in Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). The "zone of danger" rule was broadened to "fear for one's own safety" in Klassa v. Milwaukee Gas Light Co., 273 Wis. 176 77 N.W.2d 397 (1953). The requirement of physical injuries was modified to "physical manifestations of emotional distress" in Ver Hagen v. Gibbons, 47 Wis.2d 220, 177 N.W.2d 83 (1970). When "physical manifestations of emotional distress" still proved problematic, the Court carved out exceptions to it on a case-by-case basis. (See, for example, La Fleur v. Mosher, 109 Wis.2d 112, 325 N.W.2d 314 (1982) and Garrett v. City of New Berlin, 122 Wis.2d 223, 362 N.W.2d 137 (1985)).

Observer or participant. In Garrett v. City of New Berlin, Connie Garrett, and her brother, Raymond, were among a group of teenagers watching an outdoor movie along a fence line at the edge of the theater owner's property. Connie was at the fence, her brother was about 15 feet away lying on a blanket. With headlights off and using a spotlight, a police officer in his police vehicle swept the area to round up the group. In the process, he ran over Raymond. Connie witnessed the police vehicle run over her brother and saw the bloody aftermath of her brother's severe injuries. She brought suit for negligent infliction of emotional distress even though she sustained no physical injuries, and never feared for her own safety.

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The Supreme Court upheld her claim, but the court could not agree on the proper legal analysis. Three of the six-justice plurality sought to overrule Waube and three other justices distinguished the facts of Waube from those in Garrett. The latter three "characterized the plaintiff in Waube as an observer who was not directly involved in the incident. They characterized Connie Garrett as a participant in the incident who was entitled to recover even though she had not feared for her own safety, had not suffered a physical symptom of her distress any more severe than insomnia, and had not been in the zone of danger." Bowen at 649.

The distinction between observer and participant was later approved by the Court of Appeals in Westcott v. Mikkelson, 148 Wis.2d 239, 434 N.W.2d 822 (Ct. App. 1988). In this medical malpractice action, Westcott, the mother of a stillborn baby, brought both a direct claim for negligent infliction of mental distress alleging she sustained emotional harm as a result of the delivery of her stillborn baby, and a derivative claim for damages as a result of the baby's wrongful death. Both claims were allowed by the appellate court. The court found that the plaintiff-mother was not just an observer of her baby's stillbirth, she was a participant in the activity that resulted in the baby being stillborn. The court wrote that whether Westcott "is an observer or a participant, it is difficult to imagine a more clear-cut example of the latter than a mother giving birth to a child in distress." Id. at 242.

This distinction between being an observer and being a participant was also a basis for the Supreme Court's holding in Mullen v. Walczak, 2003 WI 75, 262 Wis.2d 78, 664 N.W.2d 76; and Pierce v. Physicians Insurance Fund of Wisconsin, Inc., 2005 WI 14, 268 Wis.2d 843, 673 N.W.2d 410.

In Mullen, Mullen and his wife were involved in an automobile accident. Mullen was seriously injured and his wife was killed in the accident. Mullen brought three claims: first, derivative claim for his wife's wrongful death; second, a claim for his physical injuries sustained in the accident and third, a claim for the emotional distress he suffered in witnessing his wife's death at the scene. The parties stipulated to a resolution of Mullen's wrongful death claim and his personal injury claim. At issue was only whether Mullen could recover damages for the emotional distress he suffered solely as a result of witnessing his wife's death. The Supreme Court allowed the emotional distress claim. It noted that Mullen was not a bystander under the Bowen rubric because he was involved in the accident that led to his wife's death, and, therefore, was a participant in that event.

In Pierce, the court dealt with "the narrow issue of whether a mother who suffers the stillbirth of her infant as a result of medical malpractice has a personal injury claim involving negligent infliction of emotional distress, which includes the distress arising from the injuries and stillbirth of her daughter, in addition to her derivative claim for wrongful death of the infant." The court answered in the affirmative, holding that the mother may recover as a parent for the wrongful death of the infant and as a patient for her personal injuries including the negligent infliction of emotional distress. "Pierce was not a witness but rather a participant as a patient." Id. at par. 27.

> "a patient who has suffered medical malpractice can bring a direct claim. The fact that the same patient may also have a derivative claim for wrongful death is unusual, and likely to arise in cases like this where the patient is also a victim/participant in the events at issue." Id. at par. 15.

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1580 COMPARATIVE NEGLIGENCE: PLAINTIFF AND ONE OR MORE DEFENDANTS

If, by your previous answers, you are required to answer this question, you will determine how much and to what extent each party is to blame for causing the (injury) (damage) (accident). You will decide the percentage (a portion of 100%) attributable to each party in causing the (injury) (damage) (accident).

The burden of proof on these subdivisions is on the party who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

The instruction and comment were originally published in 1972. The instruction and comment were revised in 1979 and 2010.

See Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 344-45, 173 N.W.2d 196 (1969); see also Taylor v. Western Casualty & Sur. Co., 270 Wis. 408, 71 N.W.2d 363 (1955); Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 589 (1961).

Burden of Proof. See McGuiggan v. Hiller Bros., 214 Wis. 388, 393, 253 N.W. 403 (1934); Gauthier v. Carbonneau, 226 Wis. 527, 537, 277 N.W. 135 (1938); Biersach v. Wolf River Paper & Fiber Co., 247 Wis. 536, 549, 20 N.W.2d 658 (1945); Vogel v. Vetting, 265 Wis. 19, 28, 60 N.W.2d 399 (1953).

Comparison Issues. In May v. Skelly Oil Co., 83 Wis.2d 30, 264 N.W.2d 574 (1978), the court proposed in dictum that the negligence of an injured claimant should be compared to the combined negligence of the parties who caused the claimant's injuries. However, in Reiter v. Dyken, 95 Wis.2d 461, 290 N.W.2d 510 (1980), and Wisconsin Natural Gas v. Ford, Bacon & Davis Constr., 96 Wis.2d 314, 291 N.W.2d 825 (1980), the court declared that it would not make the change proposed in May. Instead, the court reaffirmed the prevailing common law rule of individual comparison, i.e., that plaintiff's causal negligence is individually compared to the causal negligence of each defendant. In its decision, the court in Reiter and Ford, Bacon & Davis stated that a change from the individual comparison rule to a combined comparison rule, as proposed in May, should be the result of legislative action. In 1979, however, the legislature failed to enact such a bill. The legislation, 1979 S.B. 589, would have amended the comparative negligence statute (§ 895.045) by adopting a combined or collective comparison approach.

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In Ford, Bacon & Davis, the court also refused to abolish the doctrine of joint and several liability. 96 Wis.2d at 330-34.

In 1986, the court reaffirmed the holding in Reiter v. Dyken, supra, that a plaintiff's causal negligence is compared with the negligence of each defendant under the individual comparison rule. Delvaux v. Langenberg, 130 Wis.2d 464, 387 N.W.2d 751 (1986).

There is no comparison under the comparative negligence statute (§ 895.045(1)) between intentional and negligent tortfeasors. Fleming v. Thresherman's Mutual Insurance Company, 131 Wis.2d 123, 388 N.W.2d 908 (1986).

Contribution and Indemnification: A negligent tortfeasor may have a claim for indemnification against an intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Thresherman's Mutual Insurance Company, supra. An intentional tortfeasor is not entitled to contribution from a negligent joint tortfeasor. Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 436 N.W.2d 311 (1989), reversing in part and remanding 141 Wis.2d 114, 414 N.W.2d 57 (Ct. App. 1987).

Verdict Format for Cases Involving Joint Tortfeasors and Intentional and Negligent Conduct: Cases involving negligent conduct and intentional conduct by joint tortfeasors present special problems in structuring a verdict. The committee drafted the suggested verdict shown below for a sample case involving a claim of intentional or negligent conduct by an assailant and a claim of negligent conduct by a property owner for failing to prevent the assault. The verdict questions assume the plaintiff alleges that the assailant's acts were either intentional or negligent.

SUGGESTED VERDICT
(For Case Involving Both Intentional and Negligent Tortfeasors;
Note: Defendant 1 refers to the alleged assailant.
Defendant 2 refers to the alleged negligent property owner.)

Question 1: Did (Defendant 1) intentionally [sexually assault, rob, batter, etc.] (Plaintiff) on (date) at (location)?

Answer: _____
(Yes or No)

If you answered Question 1 "yes," then go to and answer Question 2.

If you answered Question 1 "no," then and only then answer Question 3.

Question 2: Was the intentional conduct of (Defendant 1) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

If you answered Question 2 "yes," go to and answer Question 5.

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If you answered Question 2 "no," go to and answer Question 3.

Question 3: At and immediately prior to the incident on (date) at (location), was (Defendant 1) negligent?

Answer: _____
(Yes or No)

If you answered Question 3 "yes," go to and answer Question 4.

If you answered Question 3 "no," go to and answer Question 5.

Question 4: Was the negligence of (Defendant 1) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

Question 5: At and immediately prior to the incident on (date) at (location), was (Defendant 2) negligent?

Answer: _____
(Yes or No)

If you answered Question 5 "yes," go to and answer Question 6.

If you answered Question 5 "no," go to and answer Question 7.

Question 6: Was the negligence of (Defendant 2) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

Question 7: At and immediately prior to the incident on (date) at (location), was (Plaintiff) negligent?

Answer: _____
(Yes or No)

If you answered Question 7 "yes," go to and answer Question 8.

If you answered Question 7 "no," go to and answer Question 9.

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Question 8: Was the negligence of (Plaintiff) a cause of (Plaintiff)'s injuries on (date) at (location)?

Answer: _____
(Yes or No)

If you have answered "yes" to two or more of Questions 4, 6 or 8, answer the following question relative to each party that you determined was a cause of (Plaintiff)'s injuries.

*** NOTE: If you answered Question 2 "yes" concerning (Defendant 1), do not include (him) (her) in answer to the following question.**

Question 9: Taking the combined negligence of each party that you have determined was a cause of injuries to (Plaintiff) as 100%, what percentage of the negligence do you attribute to:

* A. (Defendant 1) _____%

B. (Defendant 2) _____%

C. (Plaintiff) _____%

TOTAL 100%

Question 10: Regardless of how you have answered any of the previous questions, answer this question: What sum of money will fairly and reasonably compensate (Plaintiff) for (her) (his) injuries on (date) at (location) in damages with respect to:

A. Past Medical Expenses $ _____

B. Past Wage Loss $ _____

C. Past Pain, Suffering and Disability $ _____

D. Future Medical Expenses $ _____

E. Future Wage Loss $ _____

F. Future Pain, Suffering and Disability $ _____

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1582 COMPARATIVE NEGLIGENCE: ADULT AND CHILD

If you are to answer question _____, you should consider that _____ was an adult and _____ was a child and consider and weigh the credible evidence bearing on the inquiries presented, in the light of the difference in the rules which you were previously instructed to apply in determining whether the conduct of the parties was negligent.

COMMENT

This instruction and comment were originally published in 1966 and revised in 1988. The comment was reviewed without change in 1990.

In Brice v. Milwaukee Auto Ins. Co., 272 Wis. 520, 524, 76 N.W.2d 337 (1956), a litigant contended that the negligence of a minor once found by the jury must be accorded the same weight by the jury in apportioning negligence as would be done in the case such child were an adult. The court stated: "With this we cannot agree. A jury in answering the comparative negligence question in a special verdict is called upon to weigh negligence and not causative effect."

In Hanson v. Binder, 260 Wis. 464, 467, 50 N.W.2d 676 (1952), the court stated:

> The mere fact that, in this collision between the two, the jury found that the child was more negligent than the adult demonstrated to the court's satisfaction that the jury did not appreciate that different standards of ordinary care apply to these different actors.

But, see dissent of Justices Gehl and Brown.

In the case of Rasmussen v. Garthus, 12 Wis.2d 203, 107 N.W.2d 264 (1961), the court found that the instructions were not prejudicially erroneous in not directing the jury to keep in mind the difference in the degree of care required of a child compared with the degree of care required of an adult but said that the court should have so directed the jury.

In Field v. Vinograd, 10 Wis.2d 500, 103 N.W.2d 671 (1960), the instruction given was as follows: "In apportioning the negligence, you should take into consideration the fact that Sherman Vinograd was an adult, and Billy Field was a child, at the time of the accident . . . ."

In the case of Bell v. Duesing, 275 Wis. 47, 52, 80 N.W.2d 821 (1957), it was stated that the fact one of the parties is an infant should be taken into consideration in apportioning negligence.

Language in this instruction was approved in Metcalf v. Consolidated Badger Coop., 28 Wis.2d 552, 560, 137 N.W.2d 457 (1965).

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Also see the following: Gonzalez v. City of Franklin, 137 Wis.2d 109, 403 N.W.2d 747 (1987); Kohler v. Dumke, 13 Wis.2d 211, 108 N.W.2d 581 (1961); and Blair v. Staats, 10 Wis.2d 70, 102 N.W.2d 267 (1960), which confirm the view of this instruction.

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1585 COMPARATIVE NEGLIGENCE: PLAINTIFF-GUEST AND HOST-DEFENDANT NEGLIGENT

You are to answer this question only if you have found both parties causally negligent. If, by your previous answers, you are required to answer this question, you will answer the subdivisions thereof, assigning to each party such percentage, or part of 100%, which you find to a reasonable certainty is attributable to that party. You will determine how much and to what extent each party is to blame for the injuries to (plaintiff) and whether the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault that the party contributed to cause (plaintiff)'s injuries.

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you to a reasonable certainty by the greater weight of the credible evidence what your answer should be.

COMMENT

This instruction was approved by the Committee in 1979. The comment was also approved in 1979 and was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 344-45, 173 N.W.2d 196 (1969); see also Taylor v. Western Casualty & Sur. Co., 270 Wis. 408, 71 N.W.2d 363 (1955); Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 589 (1961).

Only causal negligence may be compared with causal negligence, Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 532-33, 252 N.W. 721 (1934); instruction cited as to cause statement, Olson v. Siordia, 25 Wis.2d 274, 279, 130 N.W.2d 827 (1964).

On burden of proof, see McGuiggan v. Hiller Bros., 214 Wis. 388, 393, 253 N.W. 403 (1934); Gauthier v. Carbonneau, 226 Wis. 527, 537, 277 N.W. 135 (1938); Biersach v. Wolf River Paper & Fiber Co., 247 Wis. 536, 549, 20 N.W.2d 658 (1945); Vogel v. Vetting, 165 Wis. 19, 28, 60 N.W.2d 399 (1953).

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1590 COMPARATIVE NEGLIGENCE: PLAINTIFF-GUEST PASSIVELY NEGLIGENT; HOST (OR OTHER DRIVER) NEGLIGENT

You are to answer this question only if you have found the plaintiff causally negligent with respect to (his) (her) injuries and also found the defendant(s) causally negligent in the operation of (his) (her) (their) automobile. If by your previous answers you are required to answer this question, you will answer the subdivisions thereof, assigning to each party such percentage, or part of 100%, which you find is attributable to that party. You will determine how much and to what extent each party is to blame for the injuries to (plaintiff) and whether the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault each party contributed to cause the injuries to (plaintiff).

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

This instruction and comment were approved by the Committee in 1979. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is used in the situation where the guest's negligence did not cause the accident but did cause the guest's injuries.

Lovesee v. Allied Dev. Corp., 45 Wis.2d 340, 344-45, 173 N.W.2d 196 (1969); see also Taylor v. Western Casualty & Sur. Co., 270 Wis. 408, 71 N.W.2d 363 (1955); Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 589 (1961).

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Only causal negligence may be compared with causal negligence, Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 532-33, 252 N.W. 721 (1934); instruction cited as to cause statement, Olson v. Siordia, 25 Wis.2d 274, 279, 130 N.W.2d 827 (1964).

On burden of proof, see McGuiggan v. Hiller Bros., 214 Wis. 388, 393, 253 N.W. 403 (1934); Gauthier v. Carbonneau, 226 Wis. 527, 537, 277 N.W. 135 (1938); Biersach v. Wolf River Paper & Fiber Co., 247 Wis. 536, 549, 20 N.W.2d 658 (1945); Vogel v. Vetting, 165 Wis. 19, 28, 60 N.W.2d 399 (1953).

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1591 COMPARATIVE NEGLIGENCE: GUEST PASSIVELY NEGLIGENT; CLAIMS AGAINST AND AMONG DRIVERS; APPORTIONMENT FROM ONE COMPARATIVE NEGLIGENCE QUESTION

You are to answer this question if you have found more than one party causally negligent. If, by your previous answers, you are required to answer this question, you will answer the subdivisions thereof, assigning to each party such percentage, or part of 100%, which you find is attributable to that party in causing the injuries sustained by (plaintiff) and the extent to which the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault that each party contributed to cause (plaintiff)'s injuries.

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

This instruction and comment were approved by the Committee in 1979. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was revised in 2015 to replace the term, "guilty of active negligence."

This question is submitted under Theisen v. Milwaukee Auto Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962), and Justice Fairchild's article in 46 Marquette Law Review 1 (1965). Justice Fairchild would use the total active negligence of all parties as the basis on which each party would, or would not, recover; e.g., if such active negligence of the parties totals 90% and the guest's passive negligence contributing to his or her injuries 10%, the guest would recover 90% of his or her damages. To determine the recovery or not of the negligent parties, their percentages of negligence; say A, 15%; B, 20%; and C, 55% (totaling 90%) would be converted to a new base of 100%: A, 15/90s; B, 20/90s; and C, 55/90s. If we assume that each party had damages of $1,000, reduced recoveries would be as follows: Guest would recover $900; $150 from A, $200 from B, and $550 from C; A would recover $834; $222 from B and $612 from C; B would recover $778 from C; C would recover nothing.

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1592 COMPARATIVE NEGLIGENCE: GUEST PASSIVELY NEGLIGENT; CLAIMS AGAINST AND AMONG DRIVERS; APPORTIONMENT OF COMPARATIVE NEGLIGENCE FROM TWO QUESTIONS

You are to answer question 1 (negligence of drivers which caused the accident) if you have found one or more drivers causally negligent. If by your previous answers you are required to answer this question, you will answer the subdivisions of this question, assigning to each driver such percentage, or part of 100%, which you find is attributable to that driver in causing the accident and the extent to which the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each driver in proportion to the fault that each driver contributed to cause the accident.

You are to answer question 2 (negligence which caused (plaintiff)'s injuries) if you find at least one driver as well as (plaintiff) negligent in causing (plaintiff)'s injuries. You will assign to the drivers taken as a group such percentage, or part of 100%, which you find is attributable to them in causing the injuries sustained by (plaintiff) and assign to (plaintiff) the percentage, or part of 100%, which is attributable to (plaintiff) in causing (his) (her) own injuries.

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and that party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

COMMENT

This instruction and comment were approved by the Committee in 1979. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis.

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JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was revised in 1989.

These questions are submitted under McConville v. State Farm Mut. Auto Ins. Co., 15 Wis.2d 374, 113 N.W.2d 14 (1961). In this example, the guest sued three drivers and all drivers sued each other.

SPECIAL VERDICT EXAMPLE

No. 1. What percentage of all causal negligence which produced the accident do you attribute to:

(a)	Driver A -	30%)	
(b)	Driver B -	50%)	as to causes
(c)	Driver C -	20%)	of the accident?
		100%	

No. 2. What percentage of all causal negligence which produced plaintiff's injuries do you attribute to:

(a)	The combined causal negligence of drivers A, B, and C	90%)	as to cause of plaintiff's injuries?
(b)	The causal negligence of the plaintiff	10%)	
		100%	

The court translates the findings of question No. 1 as follows:

Driver A	30 x 90% = 27%)	
Driver B	50 x 90% = 45%)	90%
Driver C	20 x 90% = 18%)	
Plaintiff		10%
		100%

On the above questions and translations, the plaintiff would recover 90% of his or her award, and defendants would pay in accordance with their percentage of negligence as found in the translation.

In the claims among the drivers, Driver A would recover 70% of his or her award from B. B would have no right to contribution from C, as to A. C would have to contribute only to the award to plaintiff. C would recover 80% of his or her award from A and B on the basis of their percentage of liability. B would recover nothing.

If more than one guest is involved, question 2 would be repeated to accommodate the pertinent inquiries as to him or her. The added question would determine the percentage of plaintiff's contribution to his or her injuries compared to the found percentages of the combined negligence of the drivers. One guest may be more or less negligent than another guest.

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1595 COMPARATIVE NEGLIGENCE: WHERE NEGLIGENCE OR CAUSE QUESTION HAS BEEN ANSWERED BY COURT

You will note that the court has answered certain questions as matters of law. If you are required to answer question ___, the comparative negligence question, then, in answering that question, you will not give the court's answer(s) any greater or lesser weight or importance than you give to any finding you make.

COMMENT

This instruction was approved in 1978. The comment was reviewed without change in 1990.

The supreme court advises giving this instruction. Reyes v. Lawry, 33 Wis.2d 112, 146 N.W.2d 510 (1961). Failure to give it may not, however, be error. Reyes, supra; Schmit v. Sekach, 29 Wis.2d 281, 291, 139 N.W.2d 88 (1966).

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1600 SERVANT: DRIVER OF AUTOMOBILE (PRESUMPTION FROM OWNERSHIP OF VEHICLE)

Uncontradicted evidence has been received in this case that _____ was the owner of the automobile driven by ____. From this fact alone, a presumption arises that (driver) was the servant of (owner). Other evidence has been introduced, however, for the purpose of showing that (driver) was not the servant of (driver) at the time of the accident.

A "servant" is a person employed to perform a service for another and who, with respect to (his) (her) physical conduct in the performance of the service, is subject to the other's control or right to control. The term "servant" as used in this instruction is not used in the ordinary sense, that is as only applying to domestic help.

In analyzing the relationship between (owner) and (driver) to determine whether (driver) was a servant, you should consider: (1) why (driver) was operating the vehicle; (2) the general understanding of the parties and their conduct which tend to characterize their relationship; and (3) the control which (owner) had over the use of the vehicle by (driver).

For (driver) to be the servant of (owner): (1) there must have been some agreement by (driver) to act on (owner)'s behalf or for (owner)'s benefit; (2) some benefit to (owner) must have resulted from (driver) operating the vehicle; and (3) (owner) must have the right to control (driver) and direct (driver) in accomplishing (owner)'s purpose. Benefit to (owner) is not confined to an undertaking conducted for financial gain. It includes any benefit to the owner, including the owner's own pleasure. The element of control by the owner does not

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mean the actual or physical operation of the vehicle but rather control as applied to the use of the automobile by (driver) to accomplish the owner's purpose.

Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (driver) was not the servant of (owner), then you must find that (driver) was the servant of (owner). The burden is on (owner) to convince you that (driver) was not the servant of (owner) at the time of the accident and that the answer to the question should be "no."

SPECIAL VERDICT

At the time of the accident, was (driver) the servant of the (owner)?

Answer:_____

Yes or No

COMMENT

This instruction and comment were approved in 1985. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The above special verdict question is an exception to the general rule that questions should frame the issue for the jury so that the burden of proof is placed on the person having the affirmative of the issue (i.e., a "yes" answer). See Wis JI-Civil 200, Burden of Proof. The common law presumption which this instruction covers provides that a driver of a vehicle is presumed to be the servant of the owner. The evidence code, Wis. Stat. § 903.01, states that once the basic fact (ownership) is found to exist, a presumption "imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." In this case, the presumed fact is that the driver was the owner's servant. Based on this evidence rule, the owner has the burden of affirmatively showing that it is more probable that the driver was not his or her servant. The committee feels that it would be confusing and awkward to ask the jury: At the time of the accident, was the (driver) not the servant of (owner)? Instead, the question should simply ask: Was (driver) the servant of the (owner)? The last paragraph of the instruction tells the jury that (owner) has the burden of showing that the question should be answered "no."

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This instruction deals with the imputation of negligence to the owner of a vehicle which has been operated negligently by a nonowner. Often, this imputed negligence is termed "vicarious liability." Prosser, Torts, 4th Ed. (1971), § 69, p. 458. Under this concept of liability, a person (in this instruction, the owner of the vehicle) is held liable for damages resulting from the negligence of another because of a legal relationship between two persons. This instruction deals with the legal relationship of master-servant.

The distinction between being an "agent" and a "servant" is crucial in determining whether the principal is vicariously liable. An agent may or may not be a servant and, in most circumstances, the principal is not vicariously liable for the negligent physical conduct of an agent who is not a servant. Where the negligent actor is a servant, however, a master can be held liable under the doctrine of respondent superior for harm caused by the torts of his or her servants. A finding of agency, therefore, is not a sufficient basis upon which to predicate a principal's vicarious liability in tort.

Because an agent who is not a servant is not subject to any right of control by his or her employer over the details of his or her physical conduct, the responsibility ordinarily rests upon the agent alone, and the principal is not liable for the torts which the agent may commit. Prosser, Torts, § 70, p. 467.

Prior to Arsand v. City of Franklin, 83 Wis.2d 40, 264 N.W.2d 579 (1978), older cases, dealing with the imputation of negligence to the owner, consistently adhered to the rule that a driver is presumed to be the agent of the owner. Hoeft v. Friedel, 70 Wis.2d 1022, 235 N.W.2d 918 (1975); Enea v. Pfister, 180 Wis. 329, 192 N.W. 1018 (1923); Laurent v. Plain, 229 Wis. 75, 281 N.W. 660 (1938); Sevey v. Jones, 235 Wis. 109, 292 N.W. 436 (1940); Le Sage v. Le Sage, 224 Wis. 57, 271 N.W. 369 (1937); Strupp v. Farmers Mut. Automobile Ins. Co., 14 Wis.2d 158, 109 N.W.2d 660 (1961); Cochran v. Allyn, 16 Wis.2d 20, 113 N.W.2d 538 (1962); Ruby v. Ohio Casualty Ins. Co., 37 Wis.2d 352, 155 N.W.2d 121 (1967); Gervais v. Kostin, 48 Wis.2d 190, 179 N.W.2d 828 (1970).

In Hoeft v. Friedel, the court said with respect to the common law presumption:

> Appellants correctly state the rule in this state that the driver of a motor vehicle is presumed to be the agent of the owner. Where this presumption is not rebutted, the rules of agency dictate that the driver's negligence be imputed to the owner. 70 Wis.2d at 1033.

Later in its opinion, the court, in Hoeft v. Friedel, explained the policy reason for the creation of the presumption:

> The presumption which arises with respect to the actual owner is attached as a matter of policy based upon the principle that "whether the car was at the time being operated in the prosecution of the defendant's [owner's] business is a matter peculiarly within the knowledge of the defendant [owner] and one upon which it is at times exceedingly difficult for the plaintiff to obtain proof." Enea v. Pfister, supra. If the evidence presented demonstrates that an agency relationship exists between the driver and someone other than the record owner, there is no reason not to apply the rule of imputation. 70 Wis.2d at 1034.

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These passages from Hoeft typify what the court in Arsand v. City of Franklin described as "a confusion too often seen in the field of agency." 83 Wis.2d at 56.

The court in Arsand and subsequently in Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 415 n. 12, 331 N.W.2d 585 (1983), noted that the terms "agent" and "servant" are often incorrectly used synonymously and interchangeably. In particular, the court in Arsand stated:

> Our prior opinions reveal a confusion too often seen in the field of agency, a confusion which has caused error here and which should be avoided in the future. Our opinions in cases involving the law of agency have not used the terms "agent," "independent contractor" and "servant" in a consistent fashion. Although our prior cases and the Wisconsin Civil Jury Instructions cite the Restatement and incorporate the concepts and standards set forth in the Restatement we have, in tort cases involving vicarious liability, used the term "agent" where, according to the usage required by Meyers v. Matthews, supra, we should have employed the term "servant." In several cases involving the liability of the defendant for the negligent conduct of another, we have stated that liability depends on whether the actor was an "independent contractor" or "agent." We should have said liability depends on whether the actor was an "independent contractor" or "servant." 83 Wis.2d at 56.

Based on the court's holdings in Arsand and later in Geise v. Montgomery Ward, Inc., and Westfall v. Kottke, 110 Wis.2d 86, 328 N.W.2d 481 (1983), the Committee has revised this instruction to make it clear that the jury's determination is whether a master-servant relationship existed at the time of the accident and not simply whether the driver was an agent of the owner.

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1605 DRIVER: SCOPE OF EMPLOYMENT

Scope of employment means that at or about the time of the accident in question, (driver) was doing something directly or indirectly connected with the business of (his) (her) employer and in the course of (his) (her) duty as an employee.

COMMENT

This instruction and comment were approved in 1978. The comment was revised in 2013.

See Wis JI-Civil 4035, Servant: Scope of Employment and Wis JI-Civil 4040, Servant: Scope of Employment; Going to and from Place of Employment.

Milwaukee Transport Services, Inc. v. Family Dollar Stores of Wisconsin, Inc., 2013 WI App 124, 351 Wis.2d 170, 840 N.W.2d 132; DeRuyer v. Wisconsin Elec. Power Co., 200 Wis.2d 349, 546 N.W.2d (Ct. App. 1996), aff'd 211 Wis.2d 169, 565 N.W.2d 118 (1997).

Fultz v. Lange, 238 Wis. 342, 345, 298 N.W. 60 (1941); Fawcett v. Gallery, 221 Wis. 195, 200, 265 N.W. 667 (1936); Bohnsack v. Huson-Ziegler Co., Inc., 212 Wis. 65, 248 N.W. 764 (1933); Barragar v. Industrial Comm'n, 205 Wis. 550, 238 N.W. 368 (1931).

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1610 JOINT ADVENTURE (ENTERPRISE): AUTOMOBILE CASES

A joint adventure is created when there is a financial or commercial agreement between the parties, either expressed or implied, to contribute money or services in a business venture. In such relation, the parties share the profits but not necessarily the losses, and each party has mutual control of the means employed to carry out their common purpose or control of the subject matter of the venture. "Control," as here used, does not mean the actual or physical operation of automobile but rather control as applied to the use of the automobile.

A joint adventure does not arise from a social relation or from a joint interest in the object or purpose of the trip.

COMMENT

This instruction and comment were approved in 1978. The comment was reviewed without change in 1990.

Bach v. Liberty Mut. Fire Ins. Co., 36 Wis.2d 72, 152 N.W.2d 911 (1967); Kuzel v. State Farm Mut. Ins. Co., 20 Wis.2d 558, 568, 123 N.W.2d 470 (1963); Estate of Starer, 20 Wis.2d 268, 270-71, 121 N.W.2d 872 (1963); Edelbeck v. Hooten, 20 Wis.2d 83, 88, 121 N.W.2d 240 (1963); Bowers v. Treuthardt, 5 Wis.2d 271, 280, 92 N.W.2d 878 (1958); Lewis v. Leiterman, 4 Wis.2d 592, 91 N.W.2d 89 (1958); Schweidler v. Caruso, 269 Wis. 438, 443, 69 N.W.2d 611 (1955); 30 Am. Jur. Joint Adventure § 2, p. 939 (1958).

When one party supplies services and the other party furnishes money, it is not necessary to prove an agreement to share the losses; such an agreement will be implied unless there is an express agreement to the contrary. Estate of Starer, supra at 271.

Parties can expressly agree not to share losses. Estate of Starer, supra.

Wisconsin cases holding that joint owners of an automobile engaged in joint use for a common purpose are joint adventures are overruled. Edlebeck v. Hooten, 20 Wis.2d 83, 91, 121 N.W.2d 240 (1963).

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1700 DAMAGES: GENERAL

The verdict contains the following damage questions, numbered ___ through ___.

[Read question(s).]

[Note: Select the following paragraphs which are appropriate.]

[I have answered question(s) _____ because the parties have agreed on the amount(s) to be inserted. You should not conclude from the fact I have answered (this) (these) question(s) as to the amount of damages that any party has admitted fault or that any party may be responsible for the amount(s) inserted. Finally, you should not assume that because I have answered (this) (these) question(s), that a party already has or necessarily will recover (this) (these) amount(s). Parties, may, as here, agree on an amount of damages without admitting they are responsible for the damages.]

[You must answer the damage question(s) no matter how you answered any of the previous questions in the verdict. The amount of damages, if any, found by you should in no way be influenced or affected by any of your previous answers to questions in the verdict.]

[In answering the damage question(s), completely disregard any percentages which you may have inserted as your answers to the subdivisions of question _____, the comparative negligence question.]

[In answering the damage questions, be careful not to include or duplicate in any answer amounts included in another answer made by you or me.]

[Your answer(s) to the damage question(s) should not be affected by sympathy or resentment (or by the fact that one (or more) of the parties from whom damages are sought

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(is an insurance corporation) (are insurance corporations)); nor should you make any deductions because of a doubt in your minds as to the liability of any party to this action.]

[**Note: Do not use this paragraph if Wis JI-Civil 202 is used**: In considering the amount to be inserted by you in answer to each damage question, the burden of proof rests upon each person claiming damages to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages with respect to the element or elements mentioned in the question and the amount of the damages. The greater weight of the credible evidence means that the evidence in favor of an answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. The amount inserted by you should reasonably compensate the person for the damages from the accident.]

[Determining damages for (pain and suffering) (insert other type of damages) cannot always be made exactly or with mathematical precision; you should award as damages amounts which will fairly compensate (named party) for (his) (her) injuries.]

[The amount you insert in answer to each damage question is for you to determine from the evidence. What the attorneys ask for in their arguments is not a measure of damages. The opinion or conclusions of counsel as to what damages should be awarded should not influence you unless it is sustained by the evidence. Examine the evidence — carefully and dispassionately — and determine your answers from the evidence in the case.]

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COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 2000, 2002 and 2003. The revision in 2002 conformed the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. An editorial correction was made in 2004. The change in 2003 revised the second paragraph on page 1 and the first paragraph on page 2. The comment was revised in 2016.

These are suggested general instructions, which may be used when appropriate, but paragraph four should always be used when there is a comparison of negligence question.

Additional instructions on the need for assessing damages even though mathematical certainty cannot be attained are contained in Wis JI-Civil 1722 (apportionment among tortfeasors) and in Wis JI-Civil 1755 (pain and suffering).)

An adaptation of this instruction was discussed in Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981).

Answering Special Verdict Questions in Medical Negligence Cases. See Comment to Wis JI-Civil 1023.

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1705 DAMAGES: BURDEN OF PROOF IN TORT ACTIONS: FUTURE DAMAGES

INSTRUCTION WITHDRAWN

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The instruction was withdrawn in 2000.

This instruction read as follows when it was withdrawn:

> In considering the amount to be inserted by you in answer to each damage question, the burden rests upon each person claiming damages to convince you by the greater weight of the credible evidence to a reasonable certainty that such person has sustained damages (with respect to the element or elements mentioned in the question) and the amount thereof.
>
> The sum named by you must, in each instance, be an amount which will fairly and justly compensate the person named in the question for the damages sustained as a natural consequence of the accident.
>
> While the plaintiff has the burden of establishing (pecuniary loss) (loss of future earning capacity), the evidence relating to this item need not be as exact or precise as that needed to support findings as to other items of damage. The reason for this rule is that the concept of (pecuniary loss) (loss of future earning capacity) necessarily involves the consideration of factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the (pecuniary loss) (loss of future earning capacity) to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

The Committee decided to create Wis JI-Civil 202 to explain the burden of proof covered in paragraphs 1 and 2 of this withdrawn instruction. It then added the concept expressed in the third paragraph to each damage instruction on the future loss of earnings or pecuniary loss. See Wis JI-Civil 1762, 1817, 1835, 1861, 1880, 1885, 1890, and 1892.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). "Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts (citations)." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973).

Pecuniary injury for the wrongful death of a minor cannot be precisely established. See Peot v. Ferraro, 83 Wis.2d 727, 266 N.W.2d 586 (1978).

See Wis JI-Civil 1750, Personal Injuries: Past and Future Disability; Wis JI-Civil 1890, Death of Minor Child: Pecuniary Loss.

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1707 PUNITIVE DAMAGES: NONPRODUCTS LIABILITY [FOR ACTIONS COMMENCED BEFORE MAY 17, 1995]

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant's conduct was outrageous.

A person's conduct is outrageous if the person acts either maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on his or her part to the consequences of his or her actions, even though he or she may not intend insult or injury. The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained.

A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.

Factors you should consider in answering this question include:

1. the grievousness of the defendant's acts,

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2. the degree of malicious intention of the defendant or the recklessness of the defendant's conduct,
3. the potential damage which might have been done by such acts as well as the actual damage[, and]

[4. the defendant's ability to pay. You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.]

(Burden of Proof, Middle Burden, use Wis JI-Civil 210.)

SPECIAL VERDICT

If you answered "yes" to question ____,* answer this question:

Was (defendant)'s conduct outrageous?

Answer: _____

Yes or No

If you answered the preceding question "yes," answer this question:

What sum, if any, do you assess against (defendant) as punitive damages?

Answer: $_____

*This question blank refers to the cause question relating to defendant's negligence.

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COMMENT

[**Special Note:** This instruction applies only to actions commenced before May 17, 1995. For actions commenced on or after this date, see JI-Civil 1707.1.]

This instruction was approved in 1989. The instruction was initially approved by the Committee in 1966. It was revised in 1981 following the decision of the Wisconsin Supreme Court in Jeffers v. Nysse, 98 Wis.2d 543, 297 N.W.2d 495 (1980), and again in 1985. The reference in the instruction to Wis JI-Civil 210 was added in 1981 following the decision in Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980). Editorial changes were made in 1992 to address gender references in the instruction. Also, the comment was revised in 1990, 1992, and 1996. An editorial correction was made in 1994.

In 1991, the Committee reviewed JI-Civil 1707 and 1707A to determine if the instructions conform to the guidelines suggested by the United States Supreme Court in Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991). In that decision, the Court upheld the award of punitive damages but suggested that the procedures for awarding punitive damages in some states might violate the due process clause of the United States Constitution.

In upholding the trial court's award of punitive damages, the Supreme Court reviewed the text of the trial court's punitive damage instruction. The Court found that the instruction enlightened the jury as to the punitive damages nature and purpose, identified the damages as punishment for civil wrongdoings of the kind involved, and explained that their imposition was not compulsory. In addition, the Court found that Alabama had established posttrial procedures for reviewing jury awards.

The Committee believes that both JI-Civil 1707 and 1707A conform to the requirements suggested in Haslip and provide adequate guidance in assessing punitive damages. See also comment to Wis JI-Civil 1707.1.

A. Conduct Justifying Punitive Damages

The availability of a punitive damage award is not dependent upon the classification of the underlying cause of action but, rather, upon proof that the conduct of the defendant was "outrageous." Brown v. Maxey, 124 Wis.2d 426, 431, 369 N.W.2d 677 (1985). The element of intent is not a prerequisite to the recovery of punitive damages. Thus, punitive damages may be recovered in tort actions based on negligence, intentional conduct, or strict liability. The court in Brown v. Maxey emphasized that "punitive damages are in the nature of a remedy and should not be confused with the concept of a cause of action." 124 Wis.2d at 431. In Brown v. Maxey, supra, the court specifically rejected the argument that punitive damages are not recoverable in a case of negligence. The court said that if the plaintiff proves only those elements constituting the negligence cause of action, punitive damages would not be available. Brown v. Maxey, supra at 432. However, the court went on to say that the mere fact that the cause of action is based upon negligent conduct does not preclude a punitive damage award if the plaintiff proves the necessary aggravating circumstances beyond ordinary negligence.

In discussing the type of conduct that must be shown to support the award of punitive damages, the court in Lundin v. Shimanski, 124 Wis.2d 175, 368 N.W.2d 676 (1985), and in Brown v. Maxey, supra at 434, cited a treatise on punitive damages written by Professors Ghiardi and Kircher. The authors explain that conduct justifying punitive damages is generally of two distinct types:

> The first type is that in which the defendant desires to cause the harm sustained by the plaintiff, or believes that the harm is substantially certain to follow his conduct. With the

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second type of conduct the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences. Neither form of conduct, therefore, involves mere inadvertence or what, in the traditional tort sense, would be called ordinary negligence. J. Ghiardi and J. Kircher, Punitive Damages Law and Practice, Ch. 5, sec. 5.01.

The intent necessary to maintain an action for an intentional tort is different than the state of mind of the tortfeasor necessary to recover punitive damages. Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978); Meshane v. Second Street Co., 197 Wis. 382, 387, 222 N.W. 320 (1928); see also Mid-Continent Refrigerator Co. v. Straka, 47 Wis.2d 739, 747, 178 N.W.2d 28 (1970).

In Wangen v. Ford Motor Co., supra at 268, the court used the term "outrageous" as an abbreviation for the type of conduct (malicious, or in wanton, willful, or reckless disregard of the plaintiff's rights) which justifies the imposition of punitive damages. If the plaintiff is able to prove the elements of "outrageous" conduct, then according to Wangen, it does not matter how the underlying tort justifying the recovery of compensatory damages is classified.

B. Punitive Damages in Survival Actions, Wrongful Death Actions, and Actions by Parents of an Injured Child

In Wangen v. Ford Motor Co., supra, the court made the following holdings regarding recovery of punitive damages in certain types of actions:

1. In a survival action, punitive damages incident to damages for pain and suffering may be awarded to the estate. The court noted that the deterrent and punishment purposes of punitive damages are met if they are allowed against a wrongdoer who survives even if the victim is dead. 97 Wis.2d at 311. The court said this holding was consistent with Wis. Stat. § 895.02 which prohibits the recovery of punitive damages from a deceased wrongdoer's executor or administrator. Punitive damages would serve no purpose after the wrongdoer's death.

2. Punitive damages may not be imposed on the wrongdoer in a wrongful death action. 97 Wis.2d at 315. Such damages are not recoverable under the wrongful death statute. Wis. Stat. §§ 895.03 and 895.04(4) and (5).

3. The parents of an injured minor may also recover punitive damages incident to their claim for loss of their child's services, society, companionship, and pecuniary support. 97 Wis.2d at 315. The court concluded that awarding punitive damages incident to the awards of compensatory damages to both the parents and the child would not constitute "double recovery." Instead, the court said it would punish and deter the tortfeasor for the willful and wanton invasion of the independent rights of each injured person.

C. Recovery Against Manufacturer in Products Liability Action

JI-Civil 1707A should be used in actions where the claim is based on products liability.

In Wangen v. Ford Motor Co., supra, the court held that punitive damages may be awarded in products liability cases. See also Collins v. Eli Lilly Co., 116 Wis.2d 166, 201, 342 N.W.2d 37 (1984); Zeller

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v. Northrup King Co., 125 Wis.2d 31, 370 N.W.2d 809 (Ct. App. 1985). The court, in Wangen, suggested the following factors to guide the jury's determination of the amount of punitive damages to be awarded in a products liability action; 97 Wis.2d at 305:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;
3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect thereon of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

In Collins v. Eli Lilly Co., supra at 202, the court discussed "enterprise liability" as it relates to the award of punitive damages. It said "the concept of punitive damages embodies a rule for individualized punishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous." The court found implicit in this concept the notion that it must be certain that the wrongdoer being punished because of his or her conduct actually caused the plaintiff's injuries. The plaintiff in a drug-related products liability action had sued multiple defendants and had stated that she could not prove which defendant had actually caused her injuries. Consequently, the court held that she could not recover punitive damages.

D. Evidence of the Wealth of a Defendant

Evidence of the wealth of the defendant is competent in determining the amount of punitive damages. Dalton v. Meister, 52 Wis.2d 173, 181, 188 N.W.2d 494 (1971); Jones v. Fisher, 42 Wis.2d 209, 220-21, 166 N.W.2d 175 (1969); Fuchs v. Kupper, 22 Wis.2d 107, 113, 125 N.W.2d 360 (1963); Malco v. Midwest Aluminum Sales, 14 Wis.2d 57, 109 N.W.2d 516 (1961); Gladfeldter v. Doemel, 2 Wis.2d 635, 648, 87 N.W.2d 490 (1958); Thomas v. Williams, 139 Wis. 467, 470, 121 N.W. 148 (1909); Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884). See also Ghiardi, Personal Injury Damages in Wisconsin sec. 2.10 (Wis. Current Law Series 1964); Wikhem, The Rule of Exemplary Damages in Wisconsin, 2 Wis. L. Rev. 129, 154 (1923). Failure to show the net worth of the defendant does not invalidate the award of punitive damages but eliminates one factor by which the reasonableness of the award can be gauged. Fahrenberg v. Tengel, 96 Wis.2d 211, 235, 291 N.W.2d 516 (1980).

But, where there are two or more defendants, evidence of the wealth of the defendants is inadmissible. Ogodziski v. Gara, 173 Wis. 380, 181 N.W. 231 (1921); Fahrenberg v. Tengel, 96 Wis.2d 211, 291 N.W.2d 516 (1980); Meke v. Nicol, 56 Wis.2d 654, 664, 203 N.W.2d 129 (1973); McAllister v. Kimberly-Clark Co., 169 Wis. 473, 173 N.W. 216 (1919). Although evidence of the wealth of one joint tortfeasor is not admissible when sought against multiple defendants on joint and several liability, such evidence is properly admissible where the plaintiff seeks punitive damages against a defendant individual. Fahrenberg v. Tengel, supra at 225. See also J. Ghiardi and J. Kircher, Punitive Damages Law and Practice, Ch. 9, sec. 9.09.

Thus, the parenthetical paragraph on page two is used only when punitive damages are sought from a defendant individually.

Wealth of Parent. Evidence of the wealth of the parents of a defendant is irrelevant where punitive damages could not be assessed against the parents for their conduct, even in situations in which

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the parents are obligated by statute to pay compensatory damages. Franz v. Brennan, 150 Wis.2d 1, 440 N.W.2d 562 (1989).

E. Necessity of Compensatory Damages; Application of Comparative Negligence Statute

The Wisconsin Supreme Court has held that in order for punitive damages to be available to a claimant, actual damages must have been awarded. Tucker v. Marcus, 142 Wis.2d 425, 418 N.W.2d 818 (1988). The court said an "award" represents a remedy recoverable in accordance with an order for judgment.

The court in Tucker v. Marcus, supra, also held that punitive damages are not "damages for negligence" under the comparative negligence statute. Wis. Stat. § 895.045. Thus, punitive damages are not subject to proportionate reduction based on plaintiff's comparative negligence.

F. Subsequent or Unrelated Bad Acts by the Defendant

If evidence is presented regarding conduct by the defendant that is unrelated to the defendant's conduct causing the plaintiff's injuries, consider giving the following limiting instruction:

> **Furthermore, the conduct for which you find punitive damages should be assessed must have caused or contributed to the plaintiff's injuries.**

The language suggested above is not appropriate in all cases in which punitive damages are sought. However, case law supports the concept that the jury in answering the punitive damages special verdict question must focus on the acts causing the injuries for which compensatory damages are assessed. Kehl v. Economy Fire & Casualty Co., 147 Wis.2d 531, 534-38, 433 N.W.2d 279 (Ct. App. 1988); Lievrow v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

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1707A PUNITIVE DAMAGES: PRODUCTS LIABILITY [FOR ACTIONS COMMENCED BEFORE MAY 17, 1995]

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant's conduct was outrageous.

A person's conduct is outrageous if the person acts either maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on (his) (her) part to the consequences of (his) (her) actions, even though (he) (she) may not intend insult or injury. The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss (he) (she) has sustained.

A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering this question include:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;

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3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect on the manufacturer of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

(Burden of Proof, Middle Burden, use Wis JI-Civil 210.)

SPECIAL VERDICT

If you answered "yes" to question ____,* answer this question:

Was (defendant)'s conduct outrageous?

Answer: _____

Yes or No

If you answered the preceding question "yes," answer this question:

What sum, if any, do you assess against (defendant) as punitive damages?

Answer: $_____

*This question blank refers to the cause question relating to defendant's negligence.

COMMENT

[Special Note: This instruction applies only to actions commenced before May 17, 1995. For actions commenced on or after this date, see JI-Civil 1707.1 and 1707.2.] This instruction was approved in 1989. Editorial changes were made in 1992 to address gender references in the instruction. The comment was modified in 1996. This instruction is to be used in product liability actions. See Comment, Wis JI-Civil 1707 and 1707.1.

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1707.1 PUNITIVE DAMAGES: NONPRODUCTS LIABILITY

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

A person's acts are malicious when they are the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury is intended.

A person acts in an intentional disregard of the rights of the plaintiff if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Before you can find an intentional disregard of the rights of the plaintiff, you must be satisfied that the defendant's act or course of conduct was:

(1) deliberate;

(2) an actual disregard of the plaintiff's right to safety, health, or life, a property right, or some other right; and

(3) sufficiently aggravated to warrant punishment by punitive damages.

A defendant's conduct giving rise to punitive damages need not be directed at the plaintiff seeking punitive damages. There is no requirement that (defendant) intended to cause harm or injury to (plaintiff).

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously

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or in an intentional disregard of the plaintiff's rights, you do not have to award punitive damages. Punitive damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you should determine the amount you believe will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering question _____ include:

1. the grievousness of the defendant's acts,
2. the degree of malice involved,
3. the potential damage which might have been done by such acts as well as the actual damage, and
4. the defendant's ability to pay. You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.

[The law provides that punitive damage may not exceed twice the amount of compensatory damages you have awarded the plaintiff or $200,000.00, whichever is greater. These dollar limitations are not a measure of damages, but a limit on recovery. You should determine the amount, if any, you believe should be awarded in punitive damages.][1]

(Burden of Proof, Middle Burden, use Wis JI-Civil 205)

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SPECIAL VERDICT

If you answered "yes" to question ___,* answer this question:

Did (defendant) act maliciously toward (plaintiff) or in an intentional disregard of the rights of (plaintiff)?

Answer:_____

Yes or No

*[Note: This blank refers to the question(s) to which a "yes" answer would support an award of punitive damages.]

If you answered the preceding question "yes," answer this question:

What sum, if any, do you award against (defendant) as punitive damages?

Answer:$_____

[Note: See Note 2 below if the claim involves operation of a vehicle while under the influence.][2]

NOTE

[1] **Punitive Damages Cap**. Wis. Stat. 895.043(6) provides that punitive damages "may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater." In general, the jury should not be advised of the cap on damages. Guzman v. St. Francis Hospital, Inc., 240 Wis.2d 559, 580-582 (2001).

The court can advise the jury of the cap on punitive damages if improper argument is made. Improper argument occurs when counsel would have the jury load-up on punitive damages with the hope that this would bleed money from the compensatory damages. An instruction on the cap is provided for use when improper argument occurs. See also Peot v. Ferraro, 83 Wis.2d 727 (1978). In cases in which the judge has instructed before closing arguments, the judge can give a supplemental instruction on the cap.

[2] **Operation of a Vehicle While Under the Influence; Cap on Punitive Damages.** There are no limitations (caps) on punitive damages where the claim involves operation of a vehicle "while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle." If the court exercises its gatekeeping function in favor of a punitive damages question in an OAWI vehicle case, the jury should be asked the following questions.

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If you awarded any punitive damages in answer to the previous question, then answer this question:

Did (defendant) operate (his) (her) vehicle while under the influence of an intoxicant?

Answer _____
(Yes or No)

Give Wis JI-Criminal 2663A or 2663B

If you answered question _____ "yes," then answer the question:

Did the defendant's intoxication render (defendant) incapable of the safe operation of (his) (her) vehicle?

Answer _____
(Yes or No)

COMMENT

This instruction and comment were approved in 1995 and revised in 2005 and 2011. The comment was updated in 1996, 1997, 1998, 2002, 2004, 2005, 2006, 2009, 2011, 2012, 2015, and 2018.

Punitive Damages Cap. Wis. Stat. 895.043(6) provides that punitive damages "may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater." In general, the jury should not be advised of the cap on damages. Guzman v. St. Francis Hospital, Inc., 240 Wis.2d 559, 580-582 (2001).

Conduct Necessary to Support Punitive Damages. In 2005, the Wisconsin Supreme Court issued decisions in two cases involving punitive damage claims. Strenke v. Hogner, 2005 WI 25, and Patricia Wischer, et al. v. Mitsubishi Heavy Industries America, Inc., et al., 2005 WI 26. In Strenke, the court of appeals affirmed the jury award of punitive damages. The case was remanded to the court of appeals on the question of whether the jury's punitive damage award was excessive. In Wischer, the supreme court reversed the court of appeals' decision that the case was not appropriate for punitive damages. The case was remanded to the court of appeals as to the constitutionality of the amount of the trial court's punitive damages award.

Strenke v. Hogner. The Strenke case was decided first by the supreme court. Strenke v. Hogner expressly overruled the court of appeals' decision in Wischer. Some of the rulings made in Strenke v. Hogner were:

1. The court of appeals' decision in Wischer is erroneous and overruled. The correct interpretation of Wis. Stat. § 895.85(3) (now § 895.043(3)) is:

- There is no requirement of intent to injure or cause harm in a jury instruction. Rather the focus is on a disregard of rights.

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- The legislature did not intend an intentional disregard of the rights of the plaintiff to require intent to cause injury to the plaintiff.

2. The defendant's conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages to recover under Wis. Stat.§ 895.85 (now § 895.043).

3. The court in Strenke agreed that the legislature tried to make it harder to recover punitive damages by enacting Wis. Stat. § 895.85(3) (now § 895.043(3)). According to the court's opinion, indifference on the person's part to the consequences of his or her actions is no longer sufficient. The statute requires an "intentional disregard of rights" as defined by Wisconsin Jury Instruction-Civil 1707.1. In Paragraph 37 of the Strenke decision, the supreme court states that the court's analysis is consistent with that of the Civil Jury Instructions Committee. The court concludes:

> Thus, in response to the first question certified by the Court of Appeals, we conclude that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. This will require that an act or course of conduct be deliberate. Additionally, the act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, a property right, or some other right. Finally, the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages. (Paragraph 38)

4. Strenke also dictates that trial judges serve as "gatekeepers" before sending a question on punitive damages to the jury. A punitive damages question is not to be sent to the jury in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite conduct. The middle burden of proof must be met. According to Justice Bradley's opinion,

> "punitive damages are not recoverable for mere negligence. Furthermore, not every drunk driving case will give rise to punitive damages. Only when the conduct is so aggravated that it meets the elevated standard of an 'intentional disregard of rights' should a circuit court send the issue to the jury."

Little guidance is given in the Strenke opinion concerning the standard the trial judge is to apply in exercising this gatekeeping function. For two recent decisions involving the trial court's gatekeeping role as to punitive damages, see Berner Cheese Corp. v. Krug, 2008 WI 95, 312 Wis.2d 251, 752 N.W.2d 800 and Henrikson v. Strapon, 2008 WI App 145, 314 Wis.2d 225, 758 N.W.2d 205.

5. Last, the supreme court concluded in Strenke that the defendant's conduct was sufficiently aggravated to warrant punishment by punitive damages. The court could not agree, however, whether the punitive damages of $225,000.00 was excessive. The court remanded this issue to the court of appeals.

Wischer v. Mitsubishi Heavy Industries America. The supreme court's decision in Wischer reviewed the court of appeals' decision. This decision was overruled by Strenke v. Hogner. The question accepted for review in Wischer was "what proof was required for a plaintiff to recover punitive damages under the phrase 'in an intentional disregard of the rights of the plaintiff' as provided in Wis. Stat. § 895.85(3) (now

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§ 895.043(3))." A supplemental briefing was done on the issue of whether the punitive damages award was unconstitutional.

The supreme court affirmed the trial court's decision to submit the question of punitive damages to the jury.

The court, however, declined to address the issue of the constitutionality of the amount of the punitive damages award because of numerous unresolved issues. The court remanded those issues for review by the court of appeals under Trinity Evangelical Lutheran Church v. Tower Ins. Co., 261 Wis.2d 333 (2003); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003) and, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

The Wischer decision contains an extensive analysis of the evidence. The court concluded:

> To sum up, we are satisfied that the evidence about MHIA's failure to determine and factor in the wind speed, if believed, was, under the circumstances of the present case, in and of itself sufficient evidence, that MHIA was aware that its conduct was substantially certain to result in the plaintiffs' rights being disregarded. (Paragraph 58)

Chief Justice Abrahamson's decision reaffirms the Strenke language that:

> A defendant's act or course of conduct must be deliberate. A defendant must be aware that his or her conduct is substantially certain to result in the plaintiff's rights being disregarded-the rights of the plaintiffs to safety, health, or life, a property right, or some other right. Furthermore, the course of conduct must actually disregard the rights of the plaintiff. Finally, the act or course of conduct must be sufficiently aggravated to warrant punishment by a punitive damages award. (Paragraph 30)

According to Chief Justice Abrahamson, the interpretation of the statute by the supreme court in Strenke v. Hogner is consistent with the explanation of the statute set forth in Wisconsin Jury Instructions-Civil 1707.1.

See also Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797 which discusses and applies the Strenke and Wischer decisions.

Gatekeeping Function of the Trial Judge. The trial court must initially determine whether the evidence establishes a proper case for the potential allowance of punitive damages and for the submission of the issue of punitive damages to the jury. As Justice Bradley notes in Strenke v. Hogner:

> Punitive damages are not recoverable for mere negligence. Furthermore, not every drunk driving case will give rise to punitive damages. Only when conduct is so aggravated that it meets the elevated standard of 'intentional disregard of rights' should the circuit court send the issue to the jury. Additionally, the trial court will need to make this determination of the propriety of a punitive damages issue before evidence of wealth of the defendant is admitted.

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For recent cases involving the "gatekeeping" function of the trial judge, see Kimble v. Land Concepts, Inc., 2014 WI 21, 353 Wis.2d 377, 845 N.W.2d 395; Henrikson v. Strapon, 2008 WI App 145, 314 Wis.2d 225, 758 N.W.2d 205; and Berner Cheese Corp. v. Krug, 2008 WI 95, 312 Wis.2d 251, 752 N.W.2d 800.

Henrikson v. Strapon, 314 Wis.2d 225 (2008), provides some guidance on the gatekeeping standards in a drunk driving case. In Henrikson, the court of appeals affirmed a dismissal of a punitive damages claim because the blood alcohol content (.11) was not sufficient to infer that the defendant's driving was substantially certain to result in a disregard of plaintiff's rights.

The Henrikson court focused on several factors:
1) The driving was run of the mill and not aggravated;
2) The level of intoxication was not excessively over the legal limit;
3) The defendant had no prior OAWI convictions;
4) No evidence of consumption of alcohol was in the record;
5) The prosecution reduced the OAWI charge to reckless driving and said it couldn't prove the OAWI charge beyond a reasonable doubt.

Absent a showing of intent, the standard that defendant's acts are practically certain to result in plaintiff's rights being violated is a high standard. See also Berner Cheese Corp v. Krug, 312 Wis.2d 251 (2008).

Constitutional Review. Following remand from the Wisconsin Supreme Court, the court of appeals in Strenke held that the award of punitive damages was not grossly excessive and not unconstitutional. Strenke v. Hogner, 2005 WI App. 194, 287 Wis.2d 135, 704 N.W.2d 309.

The United States Supreme Court has stated that: "the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive punishment on a tortfeasor." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1592 (1996). The Court overturned a $2,000,000 punitive damage award wherein $4,000 in compensatory damages were awarded. BMW had failed to apprise a new car purchaser that his automobile had been repainted following damage in shipment. Recognizing the states' legitimate interest in punishing unlawful conduct and deterring its repetition, the Court refused to adopt any bright line mathematical formula in determining when punitive damages are excessive. However, the Court did say that a "general concern of reasonableness. . . properly enters into the constitutional calculus." BMW at 1602, quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993). The Court in BMW stated that punitive damages in state courts are limited to vindicating that state's (as opposed to other states' or the nation's) interest in punishment and deterrence. Evidence of a tortfeasor's out of state conduct may nevertheless be relevant but only on the issue of the reprehensibility of the defendant's conduct. BMW, at 1594, 1598. The trial judge may want to include a limiting instruction if out of state conduct is admitted in the record.

Three considerations enter into the determination of whether an award is "grossly excessive": (1) the degree of reprehensibility of the conduct; (2) the disparity between the actual and potential harm suffered and the amount of the punitive damage award; and (3) the difference between the punitive damage award and any statutorily imposed state civil or criminal punishment for comparable conduct. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). The three State Farm factors were expanded into a six-

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factor by the Wisconsin Supreme Court in Trinity Evangelical Lutheran Church, supra. However, the supreme court in Kimble v. Land Concepts, supra, limited its analysis to the 3-factor test under Campbell and not the 6-factor test from Trinity, supra.

Special Verdict. The instruction and verdict can be modified to fit the facts. If maliciousness is not argued, then the paragraph on maliciousness in the instruction can be deleted and the verdict question shortened.

Punitive Damages in Trespass Actions; Nominal Damages. The supreme court has held that when nominal damages are awarded for an intentional trespass to land, punitive damages may be awarded. Jacque v. Steenberg Homes, Inc., 209 Wis.2d 605, 563 N.W.2d 154 (1997). In Jacque, the supreme court said the United States Supreme Court had recently clarified the three factors the court must consider when determining whether a punitive damages award violates the due process clause: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. 209 Wis.2d, at 627. The court said the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. Punitive damages should reflect the egregiousness of the offense. In other words, some wrongs are more blameworthy than others and the punishment should fit the crime.

Subsequent or Unrelated Bad Acts by the Defendant. If evidence is presented regarding conduct by the defendant that is unrelated to the defendant's conduct causing the plaintiff's injuries, consider giving the following limiting instruction:

> Furthermore, the conduct for which you find punitive damages should be assessed must have caused or contributed to the plaintiff's injuries.

The language suggested above is not appropriate in all cases in which punitive damages are sought. However, case law supports the concept that the jury in answering the punitive damages special verdict question must focus on the acts causing the injuries for which compensatory damages are assessed. Kehl v. Economy Fire & Casualty Co., 147 Wis.2d 531, 534-38, 433 N.W.2d 279 (Ct. App. 1988); Lievrow v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

Harm to Third Parties; Suggested Language. In February 2007, the United States Supreme Court issued a decision in an Oregon case involving the constitutional procedural limitations on punitive damage awards in state courts. Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L.Ed.2d 940 (2007). The court, in a 5-4 decision, held that the Due Process Clause requires state courts to adopt procedures that ensure that juries in tort cases involving punitive damages do not punish defendants for causing injury to individuals not a party to the lawsuit.

The Oregon case involved a claim brought by the widow of a smoker. The jury awarded punitive damages of $79.5 million, roughly 97 times the amount of compensatory damages. The Supreme Court held that juries cannot punish defendants for harm caused to nonparties, but said that juries can consider harm to nonparties when determining the reprehensibility of the defendant's conduct.

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The Supreme Court in Philip Morris USA v. Williams held that a jury may not use a punitive damage award to punish defendants for harm caused to nonparties to the lawsuit. The court did recognize that "evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.

The committee recommends instructing the jury as follows in a case involving evidence of harm to nonparties:

> You may not use punitive damages to punish (defendant) for harming others. Evidence of actual harm to nonparties may help to show that the (defendant)'s conduct that harmed (plaintiff) also posed a substantial risk to the general public, and so was particularly reprehensible, however, you may not use punitive damages to punish (defendant) directly for harm to those nonparties.

Defendant's Ability to Pay. Future earning capacity can be considered when weighing a defendant's ability to pay punitive damages. See Reyes v. Greatway Ins. Co., 220 Wis.2d 285, 582 N.W.2d 480 (Ct. App. 1998).

Punitive Damages for Battery; Provocation. In a battery action where punitive damages are sought and the defendant argues that the plaintiff provoked the battery, the following paragraphs may be added to the end of the instruction:

> Evidence has been received that (plaintiff) used abusive and insulting language toward (defendant) immediately prior to or at the time of the battery. Although abusive and insulting words cannot justify a battery, you may find that this conduct was a provocation that should mitigate or lessen, in whole or in part, any punitive damage award.
>
> In deciding if (plaintiff)'s conduct provoked the battery, you must determine whether (defendant)'s ability to exercise judgment was so affected by plaintiff's conduct that (defendant) acted in a manner a reasonably prudent person would act under the same circumstances. In other words, you must determine whether the conduct of (plaintiff) was so recent in time and so connected with the battery as to warrant the conclusion that the battery was actually influenced by the conduct.

Discrimination in Employment. Prior to the enactment of 2011 Wisconsin Act 219, Wisconsin Statute § 111.397(2) allowed a circuit court to order a defendant to pay to the person discriminated against compensatory damages and punitive damages under § 895.043 in an amount the circuit court or jury found appropriate. Act 219 repealed this provision.

Bifurcation of Punitive Damages. In Strenke v. Hogner, 2005 WI 25, the trial judge bifurcated the issues of liability and compensatory damages from the issue of punitive damages. In Strenke, bifurcation meant trying the case in two separate phases to the same jury. In the first phase, the jury awarded the plaintiff $2,000 in compensatory damages.

In phase two tried to the same jury immediately after phase one, evidence was introduced that defendant Hogner had four previous OAWI convictions, had consumed at least 16-18 12-ounce containers

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of beer within a five hour span, had a blood alcohol of .269%, and was on his way to another tavern to continue his drinking spree. The jury awarded $225,000 in punitive damages.

On appeal, one of the questions initially posed was the propriety of the bifurcation mode of trial. The case of Waters v. Pertzborn, 243 Wis.2d 703, was cited for the proposition that bifurcation of issues of negligence and damages under Wis. Stat. § 805.05(2) is not sanctioned. Waters involved bifurcation with two separate juries. The bifurcation issue was withdrawn so no appellate decision was made on the propriety of the trial judge's approach.

Zawistowski v. Kissinger, 160 Wis.2d 292 (1991), involved a defamation case. The trial court bifurcated the trial to first try the issue of whether the defendant made the alleged statements before proceeding to trial on the issue of defamation. The trial court based its bifurcation on Wis. Stat. § 805.05(2). Section 805.05(2) provides:

> Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04(2)(b), may order a separate trial of any claim, cross-claim, counterclaim or 3rd party claim, or of any number of claims, always preserving [160 Wis.2d 299] inviolate the right of trial in the mode to which the parties are entitled.

The trial court reasoned that bifurcation was appropriate for trial economy and fairness. The trial court also found that bifurcation would not be an undue burden on either party and would not confuse the jury. The jury found statements were not made and a second trial was unnecessary.

On appeal, the trial court's ruling on bifurcation was affirmed. The court of appeals held that the plain language of section 805.05(2) does not authorize bifurcating individual issues for trial, but neither does it prohibit the trial court from taking such action. The appeals court also concluded that the trial court's bifurcation was authorized by section 906.11. Section 906.11 authorizes control by the trial court of the mode and order of interrogating witnesses and presenting evidence.

Waters v. Pertzborn, 243 Wis.2d 703 (2001), was a negligence action involving a defense of recreational immunity in a sledding accident. A secondary issue was a social guest exception to immunity. Because the case involved permanent and complex damage issues, the trial judge ordered separate trials before different juries.

On interlocutory appeal, the supreme court held that bifurcating issues of liability and damages for separate trials before different juries was not authorized for the following reasons:

1. The legislative history of Wis. Stat. § 805.05(2) clearly indicated that bifurcation of claims was permitted but bifurcation of issues was not (exception made for insurance coverage issues under Wis. Stat. § 803.04(2)(b).

2. Wis. Stat. § 805.09(2) requires that all questions on the verdict must be agreed to by the same five-sixths of the jury.

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The supreme court overruled the Zawistowski opinion stating on page 723:

> ¶ 30. In Zawistowski, the court of appeals concluded that while § 805.05(2) does not authorize bifurcating individual issues of trial, "neither does it prohibit the trial court from taking such an action." Id. at 299. This conclusion cannot stand in light of the statements of intent to disallow bifurcation revealed in the statutory history of § 805.05(2) presented above. While it is unclear from the Zawistowski decision whether the circuit court contemplated trials before the same or different juries, to the extent that opinion is inconsistent with today's decision, it is overruled.
>
> ¶ 31. Moreover, while we agree that the evidentiary rule § 906.11(1) provides the circuit court with broad discretion in its control over the presentation of evidence at trial, that discretion is not unfettered. It must give way where the exercise of discretion runs afoul of other statutory provisions that are not discretionary. In the context of bifurcation of issues for trial before different juries, § 805.05(2) and § 805.09(2) limit that discretion.[13] (emphasis supplied)

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1707.2 PUNITIVE DAMAGES: PRODUCTS LIABILITY

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

A person's acts are malicious when they are the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury is intended.

A person acts in an intentional disregard of the rights of the plaintiff if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Before you can find an intentional disregard of the rights of the plaintiff, you must be satisfied that the defendant's act or course of conduct was:

(1) deliberate;

(2) an actual disregard of the plaintiff's right to safety, health, or life, a property right, or some other right; and

(3) sufficiently aggravated to warrant punishment by punitive damages.

A defendant's conduct giving rise to punitive damages need not be directed at the plaintiff seeking punitive damages. There is no requirement that the defendant intended to cause harm or injury to the plaintiff.

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously

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or in an intentional disregard of the plaintiff's rights, you do not have to award punitive damages. Punitive damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering question _____ include:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;
3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect on the manufacturer of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

(Burden of Proof, Middle Burden, use Wis JI-Civil 205)

SPECIAL VERDICT

If you answered "yes" to question ___,* answer this question:

Did (defendant) act maliciously toward (plaintiff) or in an intentional disregard of the rights of (plaintiff)?

Answer: _____

Yes or No

*This blank refers to the question(s) to which a "yes" answer would support an award of punitive damages.

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If you answered the preceding question "yes," answer this question:

What sum, if any, do you award against (defendant) as punitive damages?

Answer: $_____

COMMENT

This instruction and comment were approved in 1995 and revised in 2005. See comment to Wis JI-Civil 1707.1.

The frame of mind of the alleged wrongdoer is a necessary consideration in determining whether punitive damages may be imposed. Some type of knowledge is a necessary component to the imposition of punitive damages because an alleged wrongdoer who is not aware of a product's defect cannot be recklessly disregarding the rights of another person. Sharp v. Case Corp. 227 Wis.2d 1, ¶ 44, 595 N.W.2d 380 (1999). In Sharp, the court stated:

> In a products liability case, a manufacturer may be found to have acted in reckless disregard if, after having gained specific knowledge of a product's defect and its potential harm, the manufacturer fails to take some action that the defect demands, such as adequate testing procedures, effective quality control, sufficient warnings or adequate remedial procedures such as product recalls or post-sale warnings. Walter, 121 Wis. 2d at 227-28.

Harm to Third Parties. In February 2007, the United States Supreme Court issued a decision in an Oregon case involving the constitutional procedural limitations on punitive damage awards in state courts. Philip Morris USA v. Williams, 549 U.S. _____, 127 S. CT. 1057, 166 L.Ed.2d 940 (2007). The court, in a 5-4 decision, held that the Due Process Clause requires state courts to adopt procedures that ensure that juries in tort cases involving punitive damages do not punish defendants for causing injury to individuals not a party to the lawsuit.

The Oregon case involved a claim brought by the widow of a smoker. The jury awarded punitive damages of $79.5 million, roughly 97 times the amount of compensatory damages. The Supreme Court held that juries cannot punish defendants for harm caused to nonparties, but said that juries can consider harm to nonparties when determining the reprehensibility of the defendant's conduct.

The Supreme Court in Philip Morris USA v. Williams held that a jury may not use a punitive damage award to punish defendants for harm caused to nonparties to the lawsuit. The court did recognize that "evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.

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The committee recommends instructing the jury as follows in a case involving evidence of harm to nonparties:

Suggested Language:

You may not use punitive damages to punish (defendant) for harming others. Evidence of actual harm to nonparties may help to show that the (defendant)'s conduct that harmed (plaintiff) also posed a substantial risk to the general public, and so was particularly reprehensible, however, you may not use punitive damages to punish (defendant) directly for harm to those nonparties.

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1708 BATTERY: PUNITIVE DAMAGES: MITIGATION BY PROVOCATION

This instruction was withdrawn in 2009. A comment addressing battery and provocation was added to Wis JI-Civil 1707.1.

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1710 AGGRAVATION OF INJURY BECAUSE OF MEDICAL NEGLIGENCE

If (plaintiff) used ordinary care in selecting (doctor) [which (he) (she) did in this case] and (doctor) was negligent and (his) (her) negligence aggravated the (plaintiff)'s injury(ies) (failed to reduce the injury(ies) as much as (it) (they) should have been), (plaintiff)'s damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor's negligence.

COMMENT

This instruction was approved in 1960 and revised in 1983, 1991, and 1998. The instruction was reviewed without change in 2014. The comment was updated in 1991, 1998, and 2006.

This instruction is to be used in cases where there is at issue the aggravation of damages because of subsequent negligent medical treatment of injuries sustained in the accident.

Fouse v. Persons, 80 Wis.2d 390, 397-98, 259 N.W.2d 92 (1977); Butzow v. Wausau Memorial Hosp., 51 Wis.2d 281, 289, 187 N.W.2d 349 (1971); Johnson v. Heintz, 73 Wis.2d 286, 243 N.W.2d 815 (1976); Selleck v. Janesville, 100 Wis. 157, 164, 75 N.W. 975 (1898). See also Spencer v. ILHR Dept., 55 Wis.2d 525, 532, 200 N.W.2d 611 (1972); 22 Am. Jur. 2d Damages § 113 (1965).

This instruction conveys to the jury the "long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has 'exercised good faith and due care' in selecting his or her treating physicians." Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

The principle that a tortfeasor is liable for the consequences of negligence of a physician whose treatment aggravated the original injury is based upon the reasoning that the additional harm is either (1) part of the original injury, (2) the nature and probable consequence of the tortfeasor's original negligence, or (3) the normal incidence of medical care necessitated by the tortfeasor's original negligence. Butzow, supra at 285-86.

In Butzow, the court refused to accept the argument that a negligent doctor who aggravates the original injury is liable for the damage directly caused by the original tortfeasor. Liability of the doctor is limited solely to damages resulting from his own negligence and only to that extent is there joint and several liability between the doctor and the original tortfeasor. The original tortfeasor and the subsequent negligent doctor, even though the doctor's negligence aggravates the original injury, are not joint tortfeasors although they have joint liability in part. However, such joint liability does not give rise to any right of contribution. Butzow, supra at 287.

The phrase "not diminished" comes from Selleck v. Janesville, supra.

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In 2006, the Wisconsin Supreme Court discussed Wis JI-Civil 1710 in Jo-el Hanson v. American Family, 2006 WI 97. This case dealt with the insurer's claim that plaintiff's damages were inflated due to over-treatment. The trial judge modified JI-Civil 1710. The court of appeals said this instruction conveys the "long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has 'exercised good faith and due care' in selecting his or her treating physicians," citing Lievrouw, 157 Wis.2d at 358.

The defendants argued that there is a difference between unnecessary medical treatment, as opposed to medical malpractice that causes aggravation of injuries. The defendants contended that there is no causal relationship between the accident and the surgery performed. Therefore, in the defendant's view, the case should not be subject to a Wis JI-Civil 1710 instruction, because the instruction "is to be used in cases where there is at issue aggravation of damages because of subsequent negligent medical treatment of injuries sustained in the accident." Wis JI-Civil 1710 Comment.

The supreme court held that JI-Civil 1710 is correct and that the modification by the trial judge was erroneous and confusing. The court held that because the jury concluded that the plaintiff was injured in the accident, she was entitled to all of her past medical expenses, regardless of whether plaintiff's treating physician performed an unnecessary surgery, under the rule first enunciated in Selleck, 100 Wis. 157, as she used ordinary care in selecting her doctor.

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1715 AGGRAVATION OF PRE-EXISTING INJURY

The evidence shows that the plaintiff was previously injured when (briefly describe event). If the injuries of the plaintiff received in the accident on (date) aggravated any physical condition resulting from the earlier injury, you should allow fair and reasonable compensation for such aggravation but only to the extent that you find the aggravation to be a natural result of the injuries received in the accident.

COMMENT

This instruction and comment were revised in 1983. The comment was reviewed without change in 1990.

Kablitz v. Hoeft, 25 Wis.2d 518, 523-25, 131 N.W.2d 346 (1964); Egan v. Travelers Ins. Co., 223 Wis. 129, 132, 269 N.W. 667 (1936). See also Lautenschlager v. Hamburg, 41 Wis.2d 623, 632-34, 165 N.W.2d 129 (1969); 22 Am. Jur. 2d Damages §§ 122 and 124.

The applicable principle is the same as that which controls when there is aggravation of an existing ailment that is more than a mere latent tendency. "The recovery includes no damages for injuries which result from the original condition but are confined to those which are due to its enhancement or aggravation." 22 Am. Jur. 2d Damages §§ 122 and 124 (1965).

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1720 AGGRAVATION OR ACTIVATION OF LATENT DISEASE OR CONDITION

In answering subdivision ___ of question ___, you cannot award any damages for any (pre-existing disease, condition, or ailment) (predisposition to disease) except insofar as you are satisfied that the (disease, condition, or ailment) (predisposition to disease) has been (aggravated) (activated) by the injuries received in the accident on (date). If you find that the plaintiff had a (pre-existing disease or condition which was dormant) (predisposition to disease) before the accident but that such (disease or condition) (predisposition to disease) was (aggravated) (brought into activity) because of the injuries received in the accident, then you should include an amount which will fairly and reasonably compensate (plaintiff) for such damages (plaintiff) suffered as a result of such (aggravation) (activation) of the condition.

Any ailment or disability that the plaintiff may have had, or has, or may later have, which is not the natural result of the injuries received in this accident, is not to be considered by you in assessing damages. You cannot award damages for any condition which has resulted, or will result, from the natural progress of the pre-existing disease or ailment or from consequences which are attributable to causes other than the accident.

If the plaintiff was more susceptible to serious results from the injuries received in this accident by reason of a (pre-existing disease or condition) (predisposition to disease) and that the resulting damages have been increased because of this condition, this should not prevent you from awarding damages to the extent of any increase and to the extent such damages were actually sustained as a natural result of the accident.

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COMMENT

This instruction was originally published in 1960. The instruction and comment were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Use either pre-existing or predisposition according to the facts.

Kablitz v. Hoeft, 25 Wis.2d 518, 523-25, 131 N.W.2d 346 (1964). Peters v. Zimmerman, 275 Wis. 164, 172, 81 N.W.2d 565, 569 (1957); Woodward v. City of Boscobel, 84 Wis. 226, 234-35, 54 N.W. 332, 334-35 (1893); McNamara v. Village of Clintonville, 62 Wis. 207, 213-14, 22 N.W. 472, 474-75 (1885); Stewart v. City of Ripon, 38 Wis. 584, 590-91 (1875); 23 Am. Jur. 2d Damages §§ 122 and 124 (1965).

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1722 DAMAGES FROM NONCONCURRENT OR SUCCESSIVE TORTS

Subdivision ____ of question ____ asks what sum will fairly and reasonably compensate (plaintiff) for any damages (plaintiff) incurred in the accident involving (plaintiff) and (defendant).

Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.

You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering this question (these questions), you should use your best judgment based on the evidence received during the trial to determine the damages incurred by (plaintiff) in the accident involving (defendant).

COMMENT

This instruction was originally approved by the Committee in 1963. The instruction and comment were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

See Comment to Wis JI-Civil 1722A.

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1722A DAMAGES FROM NONCONCURRENT OR SUCCESSIVE TORTS (To be used where several tortfeasors are parties)

Evidence has been received during the trial that (the plaintiff) may have received injuries from separate accidents.

Subdivision ___ of question ___ asks what percentage of any damages incurred by (plaintiff) and (defendant A). Subdivision ____ of question ____ asks the same question as to what percentage of any damages incurred by (plaintiff) was attributable to the accident involving (plaintiff) and (defendant B).

Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.

You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering these questions, you should use your best judgment, based on the evidence received during the trial, to apportion the percentages of any damage sustained by (plaintiff) to the separate accidents.

SPECIAL VERDICT

If you have answered "yes" to both questions ___ and ___ (i.e., causal negligence of both nonconcurrent tortfeasors), what percentage of all the damages received by the (plaintiff) do you attribute to:

SUBDIVISION A - The accident involving
(plaintiff) and (defendant A)? _____%

SUBDIVISION B - The accident involving
(plaintiff) and (defendant B)? _____%

TOTAL 100%

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COMMENT

This instruction and comment were approved in 1983. The comment was reviewed without change in 1990. Editorial changes were made to the instruction in 1992 and to the comment in 1996.

Wis JI-Civil 1722 and 1722A are to be used where the plaintiff has suffered injuries from nonconcurrent torts, also referred to as successive torts. This instruction (1722A) is to be used where more than one tortfeasor is in the lawsuit as a party.

The Committee recognizes the difficulties, in some cases, in apportioning damages between or among nonconcurrent tortfeasors. This instruction requires the jury to divide the damages even though such a division may be difficult because of the nature of the plaintiff's injuries.

Formerly, Wisconsin Jury Instructions - Civil contained a series of three instructions which dealt with the issue of apportioning damages from nonconcurrent torts. These instructions were: (1) Wis JI-Civil 1721, Damages: Indivisible Injuries from Nonconcurrent or Successive Torts: Expert Testimony; (2) Wis JI-Civil 1722, Damages: Divisible Injuries from Nonconcurrent or Successive Torts; and (3) Wis JI-Civil 1723, Damages: Conflict as to Whether Injuries are Divisible or Indivisible. These instructions were revised by the Committee in 1978 to conform the instructions to the supreme court's decisions in Johnson v. Heintz, 61 Wis.2d 585, 213 N.W.2d 85 (1973); and after retrial in Johnson v. Heintz, 73 Wis.2d 286, 243 N.W.2d 815 (1976). According to its comment, Wis JI-Civil 1721 was to be used where the court determined as a matter of law that the defendants were not joint tortfeasors, and that the accidents were successive, and that there was uncontroverted expert testimony that the plaintiff's injuries were not divisible. Wis JI-Civil 1722 was to be used where the trial judge determined that the damages were divisible. Wis JI-Civil 1723 was to be used where there was a conflict in the trial testimony on whether the injuries were divisible. As discussed later in this comment, JI-Civil 1721 and 1723 have been withdrawn by the Committee. [In 1996, a new instruction, dealing with a different issue, was assigned the number JI-Civil 1723.]

In earlier case law, the Wisconsin Supreme Court had suggested that nonconcurrent tortfeasors were jointly liable for all injuries to the victim where it was impossible to divide the harm caused by each defendant. Heims v. Hanke, 5 Wis.2d 465, 93 N.W.2d 455 (1958); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955). Those two cases stood for the general proposition that because allocating responsibility for indivisible injuries would place an impossible burden on juries, contribution was appropriate for the actual injury, even though the injury was the result of successive (not joint) tortious acts. This suggestion in Heims and Bolick that joint liability could arise from the indivisibility of injuries was expressly rejected by the court in Butzow v. Wausau Memorial Hosp., 51 Wis.2d 281, 187 N.W.2d 349 (1971). Justice Hallows, who authored that opinion, stated that juries should have no more difficulty in allocating damages to the respective negligence of two tortfeasors than they do in allocating contribution of negligence of two tortfeasors to the injury and damages.

In the first Johnson v. Heintz decision, the supreme court reaffirmed the holding in Butzow that inseparability of damages could not create joint liability of successive tortfeasors. Johnson No. 1, in rejecting 1721, clearly stated that a tortfeasor is only responsible for the percentage of the damages and injury as was caused by his or her negligence. The term "joint liability," as employed in earlier cases, was used in the generic sense. It is not a joint and several liability concept as in the typical two-car accident case where two sources of negligence concur in time and combine to produce one accident. There, of course, contribution will lie and the liability is joint and several.

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In the second Johnson v. Heintz decision, the court noted that in Johnson No. 1, it had stated that an "allocation of damages as to the impact was necessary." Nevertheless, the court, in dicta, suggested that expert testimony could be used to establish the indivisibility of the plaintiff's injuries and, consequently, the joint liability of nonconcurrent tortfeasors. This suggestion was dicta because the jury verdict after the retrial determined that all damages were occasioned by the first impact and that the defendant Heintz was solely responsible for all damages in the case.

After reviewing the case law on this issue, the Committee believes that the jury should apportion all damages received in nonconcurrent torts. As such, Wis JI-Civil 1721 (1978) and 1723 (1978) are withdrawn. [Reporter's Note: A new instruction dealing with enhanced injuries was numbered JI-Civil 1723 in 1995.] Wis JI-Civil 1722 has been simplified so that it applies where only one tortfeasor is a party. Wis JI-Civil 1722A has been added for use in cases where multiple tortfeasors are actually in the lawsuit. This instruction requires the jury to apportion the plaintiff's damages between the nonconcurrent tortfeasors. This conforms to the supreme court's decision in the first Johnson decision and to Justice Hallows' statement in Butzow that the concept of the inseparability of damages "is an importation from other states and is foreign to our jurisprudence, at least since 1931 when our comparative negligence statute was enacted."

In Foley v. City of West Allis, 113 Wis.2d 475, 485-86, 335 N.W.2d 824 (1983), the court stated that "as a general rule, when there is a logical basis to allocate damages between two or more incidents and among various parties, courts attempt to do so." Citing Prosser, Law of Torts § 65 (4th ed. 1971) and Restatement, Second, Torts §§ 433A and 465 (1975). Foley involved the apportionment of damages to "seat-belt negligence" by the plaintiff. The court noted that since failure to wear seat belts generally causes incremental injuries, damages should be allocated between the first incident (the actual collision) and the second incident (the collision within the plaintiff's car).

Section 433A of Restatement, Second, Torts, quoted in Foley, states:

433A. Apportionment of Harm to Causes

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or
(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

For a further discussion of the indivisibility of injuries under Wisconsin tort law, see Scott, "The Apportionment of 'Indivisible' Injuries," 61 Marq. L. Rev. 559 (1977).

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1723 ENHANCED INJURIES

This is a [crashworthiness] [second collision] [enhanced injury] case. (Plaintiff) does not claim (enhanced injury defendant) caused the [collision] [accident] to occur.

(Plaintiff) does claim that [enhanced injury defendant was negligent] [there existed a defect in (the product) which was unreasonably dangerous to a prospective user].

(Plaintiff) further claims that such [negligence] [defective product] was a substantial factor in producing enhanced injuries to (himself) (herself).

Questions _____ and _____ refer to those alleged enhanced injuries. It applies to those injuries that (plaintiff) received over and above any injuries (he) (she) would have received as a result of the [collision] [accident] if the [defendant was not negligent] [product was not unreasonably dangerous and defective].

First, you must determine whether the [defendant was negligent] [defendant's product was unreasonably dangerous and defective] as inquired about in question _____.

If you find [defendant was negligent] [the product was defective], then you must determine in question _____ whether that [negligence] [defective product] was a cause of enhanced injuries to (plaintiff); i.e., whether that [negligence] [defective product] was a substantial factor in producing injuries over and above what probably would have been sustained in the [collision] [accident].

[Burden of Proof, Wis JI-Civil 200]

If you have found that at least one party's negligence was a cause of injuries to (plaintiff) in the [collision] [accident] and have further found that (enhancing injury defendant)'s [negligence] [product] was a cause of enhanced injuries to (plaintiff), then you

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will answer question _____ and determine how much and to what extent (plaintiff)'s total injuries and damages were enhanced or increased by the negligence of (enhancing injury defendant). You will affix a percentage, or part of 100%, which you are satisfied should be attributable to (enhancing injury defendant).

Once (plaintiff) has established that (he) (she) sustained enhanced injuries as a result of (enhancing injury defendant)'s [negligence] [defective product], then the defendants have the burden of proof in apportioning how much of those injuries should be allocated between the [collision] [accident] and the alleged enhancement occurrence.

SPECIAL VERDICT

1. [Regular negligence question on defendant who allegedly caused the initial "accident" or "incident" and/or the following:]

   Was the (product), when it left the possession of (defendant), in such defective condition as to be unreasonably dangerous to a prospective user?

   Answer:_____
   Yes or No

2. If you answer question _____ "yes," then answer this question:

   Was such (negligence) (defective condition) a cause of (the accident) (injury to {the plaintiff})?

   Answer:_____
   Yes or No

3. Was (plaintiff) negligent with respect to caring for (his) (her) own safety?

   Answer:_____
   Yes or No

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4. If you answer question _____ "yes," then answer this question:

Was such negligence a cause of (the accident) (injury) to (plaintiff)?

Answer:_____
Yes or No

5. [Regular comparison question on who was at fault in causing initial accident or incident.]

6. What sum of money will fairly and reasonably compensate (plaintiff) for all total damages sustained by (him) (her) as a natural and probable consequence of the incident on (date) with respect to:

a. Pain, suffering and disability to date? $_____

b. Other subparts as required by the evidence, etc. $_____

7. [Regular negligence question as to defendant who allegedly caused enhanced injuries to the plaintiff and/or:]

Was the (product), when it left the possession of (enhancing tortfeasor), in such a defective condition so as to be unreasonably dangerous to a prospective user?

Answer:_____
Yes or No

8. If you answer question _____ "yes," then answer this question:

Was such defective condition a cause of enhanced injuries to (plaintiff)?

Answer:_____
Yes or No

9. [If the evidence reflects the plaintiff was contributorily negligent in causing enhanced injuries to himself or herself, then insert negligence and cause questions as to the plaintiff.]

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10. [The Committee is suggesting three alternatives to determine the amount of damages attributable to the enhancing incident and who is responsible for same. Which alternative to use will be determined by the evidence and to a lesser degree by the style of the judge.]

a. If you have answered "yes" to at least one of questions 2 and 4 and have thus found at least one of the parties at fault in causing the (first accident), and have further answered question _____ "yes," then answer this question:

Taking 100% as the total injuries and damages sustained by (plaintiff), what percentage of those total injuries and damages do you attribute as being caused by (enhancing injury defendant)?

_____%

b. If you have answered "yes" to at least one of questions 2 and 4 and have found at least one of the parties at fault in causing the (first accident) and have further answered question _____ "yes," then answer this question:

Taking 100% as the total injuries and damages sustained by (plaintiff), what percentage of those total injuries and damages do you attribute as being caused by:

i) (Describe initial accident or incident)? _____%

ii) (Describe enhancement incident)? _____%

Total 100%

c. What sum of money will fairly and reasonably compensate the (plaintiff) for any part of his or her total damages that were sustained as natural and probable consequence (of the enhancing incident) (by the enhancing tortfeasor) with respect to:

i) Pain, suffering, and disability to date? $_____

ii) Other subparts as required by the evidence, etc. $_____

COMMENT

This instruction was approved in 1994 and revised, as to burden of proof language, in 2002. The comment was updated in 1998, 2000, and 2009.

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While the "aggravated injuries" doctrine has been the law since Butzow v. Wausau Memorial Hosp., 51 Wis. 2d 281, 187 N.W.2d 349 (1971), recent cases have applied this concept to situations where only a split second exists between the "first accident" and the "enhancement occurrence." Sumnicht v. Toyota Motor Sales, 121 Wis. 2d 338, 360 N.W.2d (1984); Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985), rev. den.; Farrell v. John Deere Co., 151 Wis. 2d 45, 443 N.W.2d 50 (Ct. App. 1989), rev. den; Hansen v. New Holland North America, Inc., 215 Wis.2d 649, 574 N.W.2d 250 (Ct. App. 1997).

A Farrell type verdict was approved in Kutsugeras v. Avco Corp., 973 F. 2d 1341 (7th Cir. 1992), and Hansen v. Crown Controls Corp., 181 Wis. 2d 673, 512 N.W.2d 509 (Ct. App. 1993), rev. den.

The Committee does not believe the two comparison question format approved in Farrell to be mandatory. The trial judge has the discretion to craft the verdict to comport with the theories advanced and evidence presented.

Based on these cases, the Committee recommends one way to handle the problem would involve, first, having inquiries on who is responsible for the "first accident" as if no "enhanced injury" was present.

Second, would be an inquiry as to whether the "enhanced injury defendant" was negligent and/or its product was unreasonably dangerous and defective.

Third, would be an inquiry as to whether any such negligence or defective product was a cause of enhanced injuries to plaintiff.

Finally, a second percentage question would determine how much of plaintiff's total injuries and damages should be attributable to enhancing injury or successor tortfeasor.

Once plaintiff has produced sufficient evidence he or she sustained enhanced injuries, then the burden of allocating the damages between the two occurrences is upon the defendants. Johnson v. Heintz 73 Wis. 2d 286, 243 N.W.2d 815 (1976); Maskrey, supra at 154.

While the supreme court criticized the verbiage of "over and above" in the verdict concerning the causation question on enhanced injuries, Sumnicht, supra at 361, the Committee believes that criticism is not applicable to the instruction.

Since successive torts are involved, no joint liability occurs and thus contribution is not allowed. However, the accident causing tortfeasor would be entitled to equitable subrogation to the extent he or she paid for those damages attributable by the jury to the enhancing tortfeasor.

If an initial tortfeasor is the same as an enhancing tortfeasor, then the trial judge should tailor the suggested verdict in questions 1 and 7 to describe the acts of that tortfeasor to properly focus the jury's analysis of the alleged negligence of the defendant.

In Ellsworth v. Schelbrock, 229 Wis.2d 542, 600 N.W.2d 247 (Ct. App. 1999), the court held that it was not prejudicial error for the trial court to fail to instruct the jury on enhanced injuries. The court said that because the jury determined that the plaintiff's car was not unreasonably dangerous and that the manufacturer had no liability, the claim of error based on the failure to give the enhanced injury instruction was rendered moot. The court said that it could not conceive how the jury's deliberations would have changed even if the enhancement instruction had been given.

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1725 FURTHER INJURY IN SUBSEQUENT EVENT

In answering question(s) ___, which relate(s) to the amount of money which will reasonably compensate (plaintiff) for injuries sustained in the (occurrence) (accident) on _____, you may also consider that (plaintiff) later sustained another injury on _____.

If the earlier injury was a substantial factor in causing the later injury, then you may include in your answer to question(s) ____ reasonable compensation for the later injury.

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The instruction was revised in 2002.

The Committee revised this instruction in 2002 to remove language suggesting that the plaintiff's contributory negligence in a subsequent event would foreclose all recovery for injuries in the subsequent event which were caused by the earlier injury.

This instruction is based upon Basche v. Vanden Heuvel, 260 Wis. 169, 175-76, 50 N.W.2d 383 (1951); Wagner v. Mittendorf, 134 N.E. 539, 540-41 (New York 1922); Annot., 9 A.L.R. 255 (1920); Annot., 20 A.L.R. 524 (1922).

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1730 DAMAGES: DUTY TO MITIGATE: PHYSICAL INJURIES

A person who has been injured must use ordinary care to mitigate or lessen (his) (her) damages. This duty to mitigate damages requires an injured person to use ordinary care to seek medical (and surgical) treatment and to submit to and undergo recommended medical (or surgical) treatment within a reasonable time to avoid or minimize any damage from physical injuries. "Ordinary care" is the degree of care usually exercised by a person of ordinary intelligence and prudence under the same or similar circumstances.

An injured person is only required to submit to those medical (or surgical) treatments to which a reasonable person would have submitted. [A person is not required to undergo treatment if it will not improve (his) (her) condition.] [Also, a person is not required to undergo treatment if treatment is unreasonably dangerous or is not reasonably within his or her means.]

In determining damages, you should keep in mind this duty of (plaintiff) to use ordinary care to mitigate damages. If you find that (plaintiff) did not do so, you should not include in your answer to this damage question any amount for consequences of the injury which reasonably could have been avoided.

The burden of proof on this issue is on (defendant) to satisfy you to a reasonable certainty, by the greater weight of credible evidence, that (plaintiff) did not use ordinary care in mitigating damages.

COMMENT

The instruction and comment were originally published in 1978 and revised in 1988 and 2011. The comment was updated in 1980, 1988, and 2011. This instruction was revised in 2002 to conform the

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language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is taken from Lobermeier v. General Tel. Co. of Wisconsin, 119 Wis.2d 129, 349 N.W.2d 466 (1984); Loser v. Libal, 269 Wis. 418, 424, 69 N.W.2d 463, 465 (1955). See also Collova v. Mutual Serv. Casualty Ins. Co., 8 Wis.2d 535, 539, 99 N.W.2d 740, 743 (1958); Hargrove v. Peterson, 65 Wis.2d 118, 123, 221 N.W.2d 875 (1974). The general rule and exceptions are discussed in two annotations: "Duty of injured person to submit to surgery to minimize tort damages," 62 A.L.R.3d 9 (1975); "Duty of injured person to submit to nonsurgical medical treatment to minimize tort damages," 62 A.L.R.3d 70 (1975).

Affirmative Defense. Failure to mitigate damages is an affirmative defense which must be raised by answer. Lobermeier v. General Tel. Co. of Wisconsin, supra at 148. Peeples v. Sargent, 77 Wis.2d 612, 631, 253 N.W.2d 459 (1977). If it is not raised, it is deemed waived. When properly raised, the burden of proving failure to mitigate is upon the party asserting it. Kuhlman, Inc. v. G. Heileman Brewery Co., 83 Wis.2d 749, 752, 266 N.W.2d 382 (1978); Howard v. State Farm Mut. Auto Liab. Co., 70 Wis.2d 985, 236 N.W.2d 643 (1975).

Reasonable Efforts to Mitigate. There is no need to instruct on the duty of a party to mitigate damages where the issue as to the reasonableness of the party's course of action was not raised at trial. Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 607, 182 N.W.2d 448 (1971).

It is a matter of fact to be determined by the jury whether a reasonable person under the circumstances should have undergone medical treatment. Lobermeier v. General Tel. Co. of Wisconsin, supra at 143.

In Hargrove v. Peterson, supra at 123, the plaintiff contended that the trial judge erred in giving a similar instruction on duty to mitigate, in conjunction with the standard instruction on the duty of the jury not to speculate (Wis JI-Civil 1740). The court rejected the argument, noting the precedent in Loser v. Libel, supra, that applied the duty to mitigate to elective surgery in the future. The court specifically declared that the duty to mitigate instruction was appropriate where the situation presented involves future surgery or future medical treatment. Hargrove, supra at 126.

The court in Hargrove, supra, further stated that in the case of future medical treatment "the standard as to reasonableness involved is the adult standard as to what is reasonable in the acceptance or rejection of elective surgery to mitigate damages," 65 Wis.2d at 126. The adult standard applies even where the injured party is a minor.

The proper period for which damages are allowed is only for the length of time reasonably required to effect a cure. Lobermeier v. General Tel. Co. of Wisconsin, supra at 149.

Duty to Mitigate by Retraining. It is for the jury to determine whether the plaintiff should have sought vocational retraining as a part of the plaintiff's duty to mitigate damages. Garceau v. Bunnel, 148 Wis.2d 146, 434 N.W.2d 794 (Ct. App. 1988). In Garceau, the court said the trial court's instruction erroneously placed on the plaintiff a duty to seek and obtain vocational retraining as a matter of law.

For the duty to mitigate losses from negligent acts or breach of contract, see Wis JI-Civil 1731.

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1731 DAMAGES: DUTY TO MITIGATE: NEGLIGENCE OR BREACH OF CONTRACT

A person who has been damaged may not recover for losses that (he) (she) knows or should have known could have been reduced by reasonable efforts. It is not reasonable to expect a person to reduce (his) (her) damages if it appears that the attempt may cause other serious harm. A person need not take an unreasonable risk, subject (himself) (herself) to unreasonable inconvenience, incur unreasonable expense, disorganize (his) (her) business, or put (himself) (herself) in a position involving loss of honor and respect.

If you find that a reasonable person would have taken steps to reduce damages and if you find that (plaintiff) did not take such steps, then you should not include as damages any amount which (plaintiff) could have avoided. If a reasonable person would not have taken steps to reduce loss under the circumstances in this case, then (plaintiff)'s failure to act may not be considered by you in determining (plaintiff)'s damages.

The burden of proof is on (defendant) to satisfy you to a reasonable certainty, by the greater weight of the credible evidence, that (plaintiff) should have taken steps to reduce (his) (her) loss and (failed to do so) (did not).

COMMENT

This instruction was approved by the Committee in 1982. It was re-titled and updated in 2011. The comment was updated in 1990 and 2011.

Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis.2d 749, 266 N.W.2d 382 (1978); Sprecher v. Monroe County Fin. Co. v. Thomas, 243 Wis. 568, 571, 11 N.W.2d 190 (1943); Restatement, Second, Contracts § 350.

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This instruction applies to damages for breach of contract or for damages in a tort action based on negligence that relate to property damage. For an instruction explaining mitigation of damages for negligently inflicted bodily injury, see Wis JI-Civil 1730; for an instruction explaining mitigation of damages from intentional acts, see Wis JI-Civil 1732.

See Comment to Wis JI-Civil 1806 for mitigation of damages to a growing crop.

Burden of Proof. Although the duty to mitigate damages rests with the aggrieved party, the burden of proof is upon the defaulting party to establish that the aggrieved party failed to do all that was reasonable to mitigate his damages. Sprecher, supra at 42; Byrnes v. Metz, 53 Wis.2d 627, 631, 193 N.W.2d 765 (1972). The failure to mitigate damages is an affirmative defense which must be raised by answer or be deemed waived. Wis. Stat. §§ 802.02 and 802.06; Sprecher, supra, Schiller v. Keuffel & Esser Co., 21 Wis.2d 545, 553, 124 N.W.2d 646 (1963). However, the court, in Sprecher, said a trial court has discretion to admit proof or lack of mitigation at variance with the pleadings and to amend the pleadings to conform to the proof.

Mitigation by Spending Money. Where the issue of mitigation centers on whether the plaintiff could reasonably have mitigated his damages by spending a sum of money, the following paragraph, based on the decision in Sprecher, supra at 42-49, may be inserted into the instruction:

> Sometimes it is possible for an injured person to minimize his damages by spending money. A plaintiff is required to spend a sum of money to minimize his damages only if (1) the sum of money is small in comparison to the possible losses or damages and (2) it is virtually certain that the risks incurred will avoid at least a party of the losses or damages. Damages should not be decreased where only a substantial expenditure would have minimized the total loss or where it is uncertain at the time that the expenditure would have decreased damages.

An expenditure of $9,000 was held not to be insignificant or slight under the facts of the case and thus plaintiff did not fail to mitigate by making such an expenditure. Crest Chevrolet-Oldsmobile Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 384 N.W.2d 692 (1986).

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1732 DAMAGES: DUTY TO MITIGATE: INTENTIONAL TORT

If you find that (plaintiff) knew of harm caused by (describe intentional conduct) and if you find that (plaintiff) (either) (intentionally failed to protect (his) (her) interests) (or) (was heedlessly indifferent to protecting (his) (her) interests), then you should not include as damages any amount that (plaintiff) could have avoided or minimized by reasonable efforts and failed to do so.

The burden of proof is upon (defendant) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that:

1. (plaintiff) knew of harm resulting from (describe intentional conduct); and
2. (plaintiff) intentionally failed to act to protect (his) (her) interests or was heedlessly indifferent to them.

You should not reduce (plaintiff)'s damages, if you determine that (plaintiff) was merely careless in protecting (his) (her) interests.

COMMENT

The instruction and comment were approved in 2011.

Mitigating Damages from an Intentional Tort: In S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19, the court of appeals discussed whether the duty to mitigate damages applies to a party injured by an intentional act.

The trial court said the policy behind the duty to mitigate is evident in the Restatement's section on avoidable consequences. Restatement (Second) of Torts § 918(2). The court of appeals explained the policy as follows:

> This section states that "[o]ne is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests." This rule protects the "merely careless or stupid person" from consequences that the tortfeasor intended or was

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willing to have occurred, but it does not protect "the person who stubbornly refuses to protect his [or her] own interests" from the consequences of that same tortfeasor's conduct.

The court in S.C. Johnson & Son, supra, held that a party who is injured by intentional conduct has a duty to mitigate damages, but more than a negligent failure to mitigate must be shown by the intentional tortfeasor. Instead, the defendant must prove that the plaintiff intentionally failed to act or was heedlessly indifferent to the harm caused by the defendant.

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1735 DAMAGES: NOT TAXABLE AS INCOME

In determining the amount of damages for personal injuries, you must not include in the award, or add to it, any sum to compensate the plaintiff for state or federal income taxes, since damages received as an award for personal injuries are not subject to income taxes. You will not, of course, subtract from, or exclude from, your award of damages any amount because the plaintiff is not required to pay income taxes.

COMMENT

This instruction was approved by the Committee in 1960. The comment was updated in 1981 and reviewed without change in 1990.

This instruction was approved in Behringer v. State Farm Mut. Auto Ins. Co., 6 Wis.2d 595, 603-04, 95 N.W.2d 249, 254 (1959). The last sentence was suggested in the Behringer case and in Hardware Mut. Casualty Co. v. Harry Crow & Son, Inc., 6 Wis.2d 396, 407-08, 94 N.W.2d 577, 583 (1959), both of which held that it is not error to refuse to give this instruction.

The federal rule, which was changed in Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980), appears to be substantially different from the current Wisconsin rule. Suits brought in state courts under the federal statutes, such as the Federal Employers Liability Act, are governed by the federal rule which requires that the jury be advised as to the nontaxability of an award for future earnings.

The Wisconsin rule which holds it is not error to refuse to advise the jury of the tax consequences of an award remains unchanged in all actions except those brought under federal statutes governed by federal substantive law.

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1740 DAMAGES: COMMON SCHEME OR PLAN; CONCERTED ACTION (WIS. STAT. § 895.045(2))

Question _____ asks whether the defendants engaged in concerted action?

Parties engage in concerted action when they pursue a common scheme or plan to accomplish a result that injures the plaintiff. Parties engaged in concerted action do not have to intend that plaintiff be injured.

Parties engage in concerted action if you determine that the following three elements existed:

1. there was an explicit or tacit agreement to act in accordance with a mutually agreed upon scheme or plan. The agreement need not be expressed in words, but it may be implied and understood to exist from the conduct itself; and
2. mutual acts were committed in furtherance of the common scheme or plan that were negligent or intentional; and
3. the acts undertaken to accomplish the common scheme or plan were the acts that resulted in damages.

SPECIAL VERDICT

If you have answered Question _____ and Question _____ "yes" as to (defendant), then answer Question ____.

Did (defendants) engage in concerted action (describe alleged action)?

Answer:_____

Yes or No

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COMMENT

This instruction and comment were first approved in 2005. They were revised in 2009.

If the jury does not find a defendant to have negligently or intentionally caused plaintiff's injuries, then that defendant is not liable for joint and several liability under Wis. Stat. § 895.045(2).

The Committee believes that the question of whether parties have acted in accordance with a common scheme or plan is a question of fact for the factfinder. It is not evident from the language of the statute that an improper motive or unlawful act is necessary for a common scheme or plan to exist.

Legislative Change. In 1995, the Wisconsin Legislature modified the common law of joint and several liability. Under 1995 Wisconsin Act 17 (amending Wis. Stat. § 895.045), the liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person whose percentage of causal negligence is 51% or more is jointly and severally liable for the damages allowed. However, if two or more persons "act in accordance with a common scheme or plan," the law imposes joint and several liability on each person. The 1995 legislative change is described by a statement prepared by the Director of State Courts regarding Senate Bill 11:

> This Bill revises the laws relating to comparative negligence and punitive damages. Presently, if several persons contribute to the cause of an injury to the plaintiff, each of the tortfeasors is jointly and severally liable for the plaintiff's damages, as reduced by the plaintiff's percentage of negligence. This bill provides that the negligence of the plaintiff is measured against each joint tortfeasors' percentage of negligence. A joint tortfeasors' liability is limited to the percentage of total causal negligence attributed to that party.

The legislation provided one exception to the limitation of joint and several liability. That exception is § 895.05(2) which states:

> (2) Concerted Action. Notwithstanding (1), if two or more parties' act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in § 895.85(5).

Civil Jury Instruction 1740 deals with this exception which creates an issue of fact for the fact finder.

Concerted Action Doctrine. In 2008, the supreme court concluded that Wis. Stat. § 895.045(2) is the legislative codification of the concerted action theory of liability. Richards v. Badger Mut. Ins. Co., 2008 WI 52, 309 Wis.2d 541, 749 N.W.2d 581. The court stated:

> ¶ 46 From our review of Wisconsin cases and learned treatises, wherein principles of concerted action are discussed, terms similar to those in Wis. Stat. § 895.045(2) are employed and the concerted action theory of liability is explained, we conclude that

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> § 895.045(2) is the codification of the concerted action theory of liability. The statute is consistent with the concerted action theory as explained by Wisconsin courts and in learned treatises such as Prosser's The Law of Torts and the Restatement (Second) of Torts § 876. Our decision in this regard is supported by those who considered this question when drafting the Wisconsin Civil Jury Instruction 1740.
> ¶ 47 Our conclusion that Wis. Stat. § 895.045(2) is the codification of the concerted action theory of liability does not change Wisconsin law in regard to whether the actions of a tortfeasor were a substantial factor in causing harm sustained by another. This is so because in order to fit within the parameters of § 895.045(2), a tortfeasor must already be causally negligent under substantive law. Danks, 298 Wis.2d 348, ¶ 39. One is causally negligent when his or her conduct is a substantial factor in causing injury to another. Johnson v. Misericordia Cmty. Hosp., 97 Wis.2d 521, 561, 294 N.W.2d 501 (Ct. App. 1980). Accordingly, under our interpretation of § 895.045(2), a person who is causally negligent with regard to a recovering plaintiff will have proportionate liability under § 895.045(1), unless something more is proved about that tortfeasor's conduct that will bring it within the purview of subsection (2). Danks, 298 Wis.2d 348, ¶ 39.

Elements of Concerted Action. In Richards, the supreme court held that for joint and several liability to exist "concerted action must be proved"; that something more than causal negligence is required before the actions of a tortfeasor will come within Wis. Stat. § 895.045(2). The court listed three "factual predicates necessary to proving concerted action:"

> ¶ 50 There are three factual predicates necessary to proving concerted action. First, there must be an explicit or tacit agreement among the parties to act in accordance with a mutually agreed upon scheme or plan. See Collins, 116 Wis.2d at 185. Parallel action, without more, is insufficient to show a common scheme or plan. Id. Second, there must be mutual acts committed in furtherance of that common scheme or plan that are tortious acts. See Ogle, 33 Wis.2d at 135. Third, the tortious acts that are undertaken to accomplish the common scheme or plan must be the acts that result in damages. See Collins, 116 Wis.2d at 184-85.

Instruction and Special Verdict. This instruction and suggested verdict are designed for a case involving only 2 defendants. If a party claims that he or she did not participate in a common scheme or plan with other defendants, it may be necessary to add questions directed at the alleged concerted action of each of the defendants individually, or possible combinations of defendants, *e.g.* A & B, A & B & C, A & C, or B & C.

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1741 PERSONAL INJURIES: NEGLIGENCE IN INFORMING THE PATIENT

If you have determined that (physician, chiropractor, dentist, optometrist, podiatrist) was negligent in informing (patient), you will insert as your answer to (damage question) the amount of money which, under the evidence, will reasonably and fairly compensate (patient) for the injuries suffered by (patient) as a result of (physician, chiropractor, dentist, optometrist, podiatrist)'s negligence.

(Add appropriate personal injury damage instructions.)

COMMENT

This instruction and comment were approved in 1978 (as JI-Civil 1751). They were retitled and renumbered in 1998. The instruction and comment were revised in 2014. See also Wis JI-Civil 1023.2.

If there is more than one claim, this instruction should refer to the subdivision of the damage question which asks about damages for negligence in informing the patient.

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1742 PERSONAL INJURIES: MEDICAL CARE: OFFSETTING BENEFIT FROM OPERATION AGAINST DAMAGES FOR NEGLIGENCE IN INFORMING THE PATIENT

(Note: This instruction will usually follow other instructions on damages.)

If you are satisfied that the (operation) (procedure) (treatment), even though not consented to by (patient), resulted in benefit to (patient), you may consider the value of the benefit and offset the value of the benefit against any damage to (patient).

In determining whether there should be any offset of benefit against damages, you should consider the nature of the (operation) (procedure) (treatment), (patient)'s condition before the (operation) (procedure) (treatment), and (patient)'s condition after the (operation) (procedure) (treatment). In comparing the benefit and damages, you must consider, on the basis of (medical) (chiropractic) (dental) (optometric) (podiatric) evidence, what (patient)'s condition would have been had the operation not been performed.

[If you find that benefits exceed damages, you must find that (patient) has suffered no damage.]

COMMENT

This instruction and comment were initially approved in 1978 (as JI-Civil 1751.5). They were retitled and renumbered in 1998. The instruction was revised in 2014.

"Where the defendant's tortious conduct has caused harm to the plaintiff or to his or her property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." Restatement, Torts § 920.

22 Am. Jur. 2d Damages § 204, p. 283. Dobbs, Remedies § 3.6, pp. 181-84. Maben v. Rankin, 358 P.2d 681 (Calif. 1961); Coleman v. Garrison, 281 A.2d 616 (Del. Superior 1971); Troppi v. Scarf, 187 N.W.2d 511 (Mich. 1971).

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1749 PERSONAL INJURIES: CONVERSION TABLE FOR 1998 REVISION OF DAMAGE INSTRUCTIONS

OLD INSTRUCTION NUMBER	PERSONAL INJURY INSTRUCTION (FORMER TITLE)	NEW INSTRUCTION NUMBER
1750	Past and Future Disability	1750.2
1750A	One Subdivided Question as to Past and Future Damages	1750.1
1751	Malpractice: Lack of Informed Consent	1741
1751.5	Malpractice: Offsetting Benefit from Operation Against Damages from Lack of Informed Consent	1742
1752	Traumatic Neurosis or Severe Emotional Distress	1770
1754	One Subdivided Question as to Past Damages	1754[Withdrawn]
1755	Past Pain and Suffering	1766
1765	Past Medical and Hospital Expenses	1756
1775	Past Loss of Earning Capacity	1760
1780	Loss of Business Profits	1780[Withdrawn]
1785	Past Loss of Professional Earnings	1785[Withdrawn]

This conversion table includes all damage instructions revised, withdrawn, or renumbered by the Committee in 1998 as part of its updating of instructions on damages for personal injuries.

The above list does not include the following new instructions approved in 1998:

1758 Future Medical and Health Care Expenses
1762 Future Loss of Earning Capacity
1768 Past and Future Pain, Suffering, and Disability

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1750.1 PERSONAL INJURIES: SUBDIVIDED QUESTION AS TO PAST AND FUTURE DAMAGES

No Instruction.

COMMENT

This comment was approved in 1998 as part of a large scale revision and renumbering of the personal injury damage instructions.

In the past, an instruction, Wis JI-Civil 1750A (now withdrawn), was approved for use in trials where the plaintiff sought past and future medical expenses, loss of earnings and earning capacity and pain, suffering, and disability and the special verdict contained a single subdivided question on past and future damages. The Committee has withdrawn this instruction because it only repeated the language in the individual instructions on the separate categories of compensatory damages for personal injuries.

It has long been established that the trial court has absolute discretion as to the formulation of the special verdict. Traditionally, there has been great diversity of practice in the trial courts as to how the damage question in the special verdict is framed. Some courts combine all damage elements in a single question; others combine pain and suffering and disability, future medical, and loss of future earning capacity into a single question inquiring about plaintiff's personal injury, while submitting separate questions as to past medical expense and past wage loss which are often answered by the court. Others divide each element of damages into separate inquiries. This latter approach appears to be the prevailing method.

The Committee believes the preparation of separate instructions on each element of damages provides greater flexibility so that each judge can more easily adapt these instructions to his or her preferred special verdict form.

Special Verdict. A special verdict with subdivisions separating the elements of damages, allows each judge to submit the damage question/subdivision in the order or combination he or she deems appropriate in each case. It is suggested that the trial judge use the form of the damage question in each case which is most likely to be clear to the jury, fair to all parties, and to serve the interests of justice. Should separate inquiries be made, as seems to be recommended by the Wisconsin Supreme Court in Ianni v. Grain Dealers Mut. Ins. Co., 42 Wis.2d 354, 166 N.W.2d 148 (1969), the following sequence of component instructions and special verdict questions may be considered when the question of permanency is raised.

a. Past Medical (JI-Civil 1756)
b. Future Medical (JI-Civil 1758)
c. Past Loss of Earning Capacity (JI-Civil 1760)
d. Future Loss of Earning Capacity (JI-Civil 1762)
e. Past Pain, Suffering, and Disability (JI-Civil 1766)
f. Future Pain, Suffering, and Disability (JI-Civil 1768)

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SPECIAL VERDICT

What sum of money will fairly and reasonably compensate (plaintiff) with respect to:

(a)	past health care expenses?	Answer: $_____
(b)	future health care expenses?	Answer: $_____
(c)	past loss of earning capacity?	Answer: $_____
(d)	future loss of earning capacity?	Answer: $_____
(e)	past pain, suffering, and disability?	Answer: $_____
(f)	future pain, suffering, and disability?	Answer: $_____
(g)	(other:)	

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1750.2 PERSONAL INJURIES: PAST AND FUTURE: ONE VERDICT QUESTION (EXCEPT PAST LOSS OF EARNINGS AND PAST MEDICAL EXPENSES)

[NOTE: The Committee believes use of this unsubdivided special verdict will be limited. See Comment.]

Question _____ asks what sum of money will fairly and reasonably compensate (plaintiff) for any personal injuries (he) (she) sustained as a result of the accident. Your answer to this question should be the amount of money that will fairly and reasonably compensate (plaintiff) for the personal injuries (he) (she) has suffered to date and is reasonably certain to suffer in the future as a result of the accident.

Personal injuries include pain, suffering, and disability (disfigurement) which means any physical pain, worry, distress, embarrassment and humiliation which (plaintiff) has suffered in the past and is reasonably certain to suffer in the future. You should consider also to what extent (his) (her) injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life. Consider the nature of (plaintiff)'s injuries, the effect produced by (plaintiff)'s injuries in the past, and the effect the injuries are reasonably certain to produce in the future, bearing in mind (plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

Personal injuries can also include any loss of future earning capacity suffered by (plaintiff). If you are satisfied that (plaintiff) has suffered a loss of future earning capacity as a result of the injuries sustained in the accident, your answer to this question should include the difference between what (plaintiff) will reasonably be able to earn in the future in view of the injuries sustained and what (he) (she) would have been able to earn had (he) (she) not been injured.

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[**Where appropriate add the following paragraph:** Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) loss of future earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of (plaintiff)'s services to the business, (and the profits of the business).]

Personal injuries can also include health care and treatment expenses. If you are satisfied that (plaintiff) will require health care and treatment in the future for injuries sustained as a result of the accident, include in your answer to this question the sum of money that will reasonably and necessarily be expended in the future for that care and treatment.

COMMENT

This instruction and comment were approved in 1969 as JI-Civil 1750. They were revised and renumbered in 1998.

This instruction covers a special verdict question which combines all damage elements except past loss of earnings and past medical expenses in a single question.

The Committee does not generally recommend the use of a single verdict question to determine damages where the plaintiff seeks to recover different types of damages for personal injuries. Instead, the Committee suggests the jury should be asked to answer separate questions or subdivisions to cover each of the types of damages sought by the plaintiff. However, there may be some cases in which, because of the evidence presented by the parties, it may be more expeditious to try the case so that the jury is simply asked a single question on damages which encompasses several different types of damages.

The instruction should be tailored to the evidence by only including the damage types sought by the plaintiff. See the separate types of damages covered by JI-Civil 1756 to 1768.

For evidence as to age and probable duration of plaintiff's life, see Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975); Hargrove v. Peterson, 65 Wis.2d 118, 221 N.W.2d 875 (1974); Doolittle v. Western States Mut. Ins. Co., 24 Wis.2d 135, 128 N.W.2d 403 (1963).

For prior physical condition, see Helleckson v. Loiselle, 37 Wis.2d 423, 155 N.W.2d 45 (1967); Freuen v. Brenner, 16 Wis.2d 445, 114 N.W.2d 782 (1961).

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1754 PERSONAL INJURIES: ONE SUBDIVIDED QUESTION AS TO PAST DAMAGES

Instruction Withdrawn.

COMMENT

This instruction was withdrawn in 1998 when the Committee revised and renumbered personal injury damage instructions (JI-Civil 1750 - 1785). This withdrawn instruction was simply a collection of separate instructions in the damage series.

As indicated in the Comment to JI-Civil 1750.1, the Committee recommends use of a verdict format in which the jury is asked to determine separately the various types of damages sought by plaintiff instead of lumping all recovery for personal injuries in a single unsubdivided question.

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1756 PERSONAL INJURIES: PAST HEALTH CARE EXPENSES

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for past health care services.

You will insert as your answer to this (question) (subdivision) the sum of money you find has reasonably and necessarily been incurred from the date of the accident up to this time for the care of the injuries sustained by (plaintiff) as a result of the accident.

Billing statements (which may include invoices) for health care services (plaintiff) has received since the accident have been admitted into evidence.

[**NOTE: Use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** These billing statements establish the value, reasonableness, and necessity of health care services provided to (plaintiff). You must still determine whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the accident.]

[**NOTE: Use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** The party challenging the (value of) (reasonableness and necessity of) (plaintiff)'s past health care services has the burden to prove they were not (reasonable in amount) (reasonably and necessarily provided to care for (plaintiff)). Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements (were not reasonable in amount) (do not reflect health care services reasonably and necessarily provided to care for (plaintiff)), you must find (the billing statements reflect the reasonable value of the health care services) (the health care services reflected in the billing statements

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were reasonably and necessarily provided to care for (plaintiff)). You must still determine whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the accident.]

COMMENT

This instruction was originally published in 1960 as JI-Civil 1765. It was revised in 1983 and renumbered and revised in 1998, 2008, and 2010. The comment was updated in 2000, 2005, 2006, 2008, 2010, and 2012. The instruction was reviewed without change in 2014.

Measure. The proper measure of damages for care rendered in a personal injury case is the reasonable value of the care necessarily required by the injury. Leitinger v. DBart, Inc., 2007 WI 84, 302 Wis.2d 110, 736 N.W.2d 1; Koffman v. Leichtfuss, 2001 WI 111, 246 Wis.2d 31, 630 N.W.2d 201. See also Fouse v. Persons, 80 Wis.2d 390, 259 N.W.2d 92 (1977); Green v. Rosenow, 63 Wis.2d 463, 217 N.W.2d 338 (1974); Cole v. Schaub, 164 Wash. 162, 168-69, 2 P.2d 669, 671-72 (1931); Nimlos v. Bakke, 223 Wis. 473, 476-77, 271 N.W. 33, 34 (1937); Gerbing v. McDonald, 201 Wis. 214, 218, 229 N.W.2d 860, 862 (1930). While the actual amount paid for services may reflect the reasonable value of the treatment rendered, the focus is on the reasonable value, not the actual charge. Thus, the value of services made necessary by the tort can be recovered although they have created no liability or expense to the injured person. See Leitinger, supra, ¶ 23 and Koffman, supra. The jury determines the reasonable value of the treatment rendered to the plaintiff, which is not necessarily the amount actually paid or the amount billed for the treatment. Leitinger, supra, ¶ 24.

Collateral Source. In Leitinger, the court considered whether evidence of the amount actually paid by the plaintiff's health insurer for the plaintiff's treatment was admissible in a personal injury action (not involving medical negligence) for the purpose of establishing the reasonable value of the medical treatment rendered. The supreme court said "no." It held that the collateral source rule prohibits parties in a personal injury action (not involving medical negligence) from introducing evidence of the amount actually paid by the injured person's health insurer.

An injured party is entitled to recover the reasonable value of medical services, which, under the collateral source rule, includes written-off medical expenses. Orlowski v. State Farm Mut. Auto Ins. Co., 2012 WI 21, 339 Wis.2d 1, 810 N.W.2d 775. Written-off expenses are the expenses "written off" or waived by a medical provider as a result of negotiated discounts between health insurers and the medical provider.

For a discussion of the collateral source rule in medical negligence cases, see Wis JI-Civil 1757.

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Presumption of Reasonable Value; Presumption of Reasonable and Necessary Services; Collateral Source Payments (Wis. Stat. § 908.03(6m)(bm). In 2009, the legislature enacted Wis. Stat. § 908.03(6m)(bm), as part of the Budget Bill, which deals with presumptions to be given to health care records. The subsection states:

> (bm) ***Presumption.*** Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

This language creates two "rebuttable" presumptions:

1) billing statements and invoices that are patient health care records are presumed to state the reasonable value of the health care services provided; and
2) the health care services provided are presumed to be reasonable and necessary to care for plaintiff.

Sec. 908.03(6m)(bm) also states that the party attempting to rebut the presumption of the reasonable value of the services provided to plaintiff may not present evidence of payments made or benefits conferred by collateral sources.

The committee took the following action to incorporate these new statutory presumptions:

1. Wis JI-Civil 1756 was revised to include the presumptions as to: (1) value and (2) reasonableness and necessity of services provided to plaintiff.

2. Wis JI-Civil 1757, which is applicable exclusively to medical negligence cases, was revised to add the presumptions created by § 908.03 (6m)(bm).

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1757 PERSONAL INJURIES: PAST HEALTH CARE EXPENSES (MEDICAL NEGLIGENCE CASES) (NEGLIGENCE OF LONG-TERM CARE PROVIDER): COLLATERAL SOURCES

(Question _____) (Subdivision _____ of Question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for past health care services?

A person injured by medical negligence (the negligence of a long-term care provider) may recover the reasonable value of health care services reasonably required as a result of the injury. Billing statements (which may include invoices) for health care services (plaintiff) has received since (insert event giving rise to the medical negligence/the negligence of a long-term care provider) have been admitted into evidence.

[**NOTE: Use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** These billing statements establish the value, reasonableness, and necessity of health care services provided to (plaintiff). You must still determine whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the (treatment) (diagnosis) by (_____).]

[**NOTE: Use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:** The party challenging the (value of) (reasonableness and necessity of) (plaintiff)'s past health care services has the burden to prove they were not (reasonable in amount) (reasonably and necessarily provided to care for (plaintiff)). Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements (were not reasonable in amount) (do not reflect health care services reasonably and necessarily provided to care for (plaintiff)), you must find (the billing statements reflect the reasonable

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value of the health care services) (the health care services reflected in the billing statements were reasonably and necessarily provided to care for (plaintiff)). You must still determine whether the health care services were provided for the injuries sustained by (plaintiff) as a result of the (treatment) (diagnosis) by (_____)].

The reasonable value of health care services made necessary by (medical negligence) (the negligence of a long-term care provider) may be awarded even though (plaintiff) did not incur any expense, obligation, or liability to pay for those services.

Evidence has also been received of payments made by (list sources) to (plaintiff) or on behalf of (plaintiff) for health care services.

[Evidence has also been received of services provided at no charge to (plaintiff) by (list providers).]

The evidence of payments by (list sources) has been received for the sole purpose of assisting you in determining the reasonable value of the services reasonably required by the injury. You may not reduce the reasonable value of the health care services on the basis of payments made by (list sources.)

Also (list subrogated entities) may be entitled to recover repayment or reimbursement of any amounts which you determine were the result of (the medical negligence) (the negligence of a long-term care provider).

COMMENT

This instruction was approved in 2005 and revised in 2010 and 2011. The comment was updated in 2012.

This instruction implements the decision of the Wisconsin Supreme Court in Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 2005 WI 124, 285 Wis.2d 1, 700 N.W.2d 201.

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Long-Term Care Provider. Wis. Stat. § 893.555(8), allows the admission of evidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury in an action to recover damages for negligence by a long-term care provider.

Collateral Source Payments. In Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 2005 WI 124, the supreme court concluded that, in medical negligence cases, the trial judge "must instruct the fact-finder that it must not reduce the reasonable value of medical services on the basis of the collateral source payments. Although the jury is instructed not to use the evidence of collateral source payments to reduce the award for medical services, evidence of collateral source payments may be used by the jury to determine the reasonable value of medical services." ¶ 5. See also Orlowski v. State Farm Mut. Auto Ins. Co., 2012 WI 21, 339 Wis.2d 1, 810 N.W.2d 775; Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191.

Evidence of collateral source payments is admissible under Wis. Stat. § 893.55(7) only if the evidence is relevant. In a medical malpractice action, evidence of collateral source payments is relevant if it is probative of any fact that is of consequence to the determination of damages. Weborg v. Jenny, supra. In Weborg, the circuit court admitted the evidence of life insurance proceeds and social security benefits without first determining in its discretion whether either piece of evidence was relevant to the jury's determination of damages. Because the circuit court applied an improper legal standard in admitting the evidence of life insurance proceeds and social security benefits, the supreme court concluded that the circuit court erroneously exercised its discretion.

In Lagerstrom, the court said because the jury was advised of collateral source payments and the net amount the estate paid for medical services, but was not advised of the estate's potential obligation to reimburse Medicare for medical services, the jury was not able to assess the reasonable value of medical services fully and fairly. ¶ 6. The court noted that typical collateral sources include Medicare, other state or federal government programs, medical provider write-offs pursuant to Medicare regulations, private insurance, income continuation plans, and volunteer services. ¶ 17, 30.

Collateral Source Payments; Presumptions of Reasonable Value; Presumption of Reasonable and Necessary Services; Wis. Stat. § 908.03(6m)(bm). In 2009, the legislature enacted Wis. Stat. § 908.03(6m)(bm), as part of the Budget Bill, which deals with presumptions to be given to health care records. The subsection states:

> (bm) ***Presumption.*** Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

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This language creates two "rebuttable" presumptions:

1) billing statements and invoices that are patient health care records are presumed to state the reasonable value of the health care services provided; and
2) the health care services provided are presumed to be reasonable and necessary to the care of plaintiff.

Sec. 908.03(6m)(bm) also states that the party attempting to rebut the presumption of the reasonable value of the services provided to plaintiff may not present evidence of payments made or benefits conferred by collateral sources.

The committee took the following action to incorporate these new statutory presumptions:

1. Wis JI-Civil 1756 was revised to include the presumptions as to value and reasonableness and necessity of services provided to plaintiff.

2. Wis JI-Civil 1757 which is applicable exclusively to medical negligence cases, was revised to discuss the effect of § 908.03 (6m)(bm). Currently, § 893.55(7) provides that in med-mal cases, evidence of any compensation for bodily injury received by plaintiff from a source other than the defendant to compensate the plaintiff for injury is admissible. The committee concluded that the collateral source provision (*i.e.* that collateral source evidence is not admissible) in § 908.03 (6m)(bm) does not apply in med-mal cases. A canon of statutory construction holds that a specific statute controls over a general statute. Heritage Farms, Inc. v. Markel Ins. Co., 2009 WI 27. However, the language in § 908.03 (6m)(bm) creating the presumptions of reasonable value of health care services and reasonableness and necessity of the health care services provided to plaintiff will apply in med-mal cases, because § 893.55 (7) is limited to the admissibility of collateral source payments and is silent on the presumptions.

Reasonable Versus Actual Damages. In Lagerstrom, the court noted that a person injured by medical negligence may recover the reasonable value of the medical services reasonably required by the injury. ¶ 52. The court said "in most cases the reasonable value of medical services is the actual expense, but in some cases it is not." It said "the test is the reasonable value, not the actual charge, and therefore there need be no actual charge." The court was not persuaded "that Wis. Stat. § 655.009(2) changes the long-standing rule that the "reasonable value of medical services" is the reasonable value of medical services rendered, without limitation to amounts paid. This long-standing rule has been applied in both Chapter 655 medical malpractice actions and in other actions as the method for determining the reasonable value of medical services.

Subrogation. The court in Lagerstrom said that subrogation works in tandem with the collateral source rule. The collateral source rule prevents benefits received by the victim from inuring to the tortfeasor, and subrogation prevents the victim from receiving a double recovery because the payor of benefits may recover the payments from the tortfeasor or the victim.

The Lagerstrom court analyzed Wis. Stat. § 893.55(7) and concluded that for subrogation (or reimbursement) and the collateral source rule to work in tandem to prevent a victim's double recovery and protect subrogation, the statute must be interpreted to require courts to instruct juries to consider the collateral source payments only in determining the reasonable value of the medical services rendered. ¶ 72.

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1758 PERSONAL INJURIES: FUTURE HEALTH CARE EXPENSES

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for future health care services.

If you are satisfied that (plaintiff) will require health care services in the future for injuries sustained as a result of (e.g. the accident), you will insert as your answer to this question (subdivision) the sum of money you find will reasonably and necessarily be incurred in the future to care for (plaintiff).

COMMENT

This instruction and comment were approved in 1998 and updated in 2010.

For future hospital and medical expenses, see Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972); Ashley v. American Auto Ins. Co., 19 Wis.2d 17, 119 N.W.2d 359 (1962).

To sustain an award for future health care expenses, two criteria must be met: (1) there must be expert testimony of permanent injuries requiring future medical treatment and the incurring of future medical expenses; and (2) an expert must establish the cost of such medical expenses. Weber v. White, 2004 WI 63, 272 Wis.2d 121, 681 N.W.2d 137, ¶ 20 (citing Bleyer v. Gross, 19 Wis.2d 305, 311, 120 N.W.2d 156 (1963)).

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1760 PERSONAL INJURIES: PAST LOSS OF EARNING CAPACITY

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) past loss of earning capacity.

Your answer to this (question) (subdivision) should be the difference between what (plaintiff) was reasonably capable of earning as a ((his) (her) usual occupation) from the date of the accident to the present time had (he) (she) not been injured and what (he) (she) was reasonably capable of earning during the period in view of (his) (her) (the) injuries sustained as a result of the accident.

[Where appropriate add the following paragraph: Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) past loss of earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of plaintiff's services to the business, (and the profits of the business).]

[If you find that (plaintiff) was delayed in graduating from (school), you may consider this delay in determining reasonable compensation for (his)(her) loss of earning capacity.]

COMMENT

The instruction and comment were originally published in 1969 as JI-Civil 1775. They were revised and renumbered in 1998. The instruction was revised in 1999 to incorporate former Wis JI-Civil 1788 and in 2016 by adding the words "sustained as a result of the accident" to paragraph 2. The comment was updated in 2015.

See Bach v. Liberty Mut. Fire Ins. Co., 36 Wis.2d 72, 86, 152 N.W.2d 911 (1967); Ashley v. American Auto Ins. Co., 19 Wis.2d 17, 24, 119 N.W.2d 359 (1963); Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 404, 88 N.W.2d 747, 756 (1958); Topham v. Casey, 262 Wis. 580, 585-86, 55 N.W.2d 892, 894-95 (1952); Schultz v. Miller, 259 Wis. 316, 328, 48 N.W.2d 477, 482 (1951); Brain v. Mann, 129 Wis.2d 447, 385 N.W.2d 227 (Ct. App. 1986); Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis.2d 145, 370 N.W.2d 815 (Ct. App. 1985); LaChance v. Thermogas Co. of Lena, 120 Wis.2d 569, 357 N.W.2d 1

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(1984); Fischer v. Cleveland Punch and Shear Work Co., 91 Wis.2d 85, 280 N.W.2d 280 (1979); Victorson v. Milwaukee & Suburban Transport. Corp., 70 Wis.2d 336, 234 N.W.2d 332 (1975); Koele v. Radue, 81 Wis.2d 583, 260 N.W.2d 766 (1978); Ianni v. Grain Dealers Mut. Ins. Co., 42 Wis.2d 354, 166 N.W.2d 148 (1969); Johnson v. Misericordia Community Hosp., 97 Wis.2d 521, 294 N.W.2d 501 (Ct. App. 1980); Allen v. Bonnar, 22 Wis.2d 221, 125 N.W.2d 571 (1963); Reinke v. Woltjen, 32 Wis.2d 653, 146 N.W.2d 493 (1966); Ballard v. Lumberman's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966).

The supreme court approved a former version of this instruction in Carlson v. Drew of Hales Corners, Inc., 48 Wis.2d 408, 418, 180 N.W.2d 546 (1970). The court in Carlson expressly differentiated between an instruction for "loss of wages" and an instruction for "loss of earning capacity." Where the plaintiff is not employed at the time of an injury, the court said "it is imperative to frame the instruction in terms of loss of earning capacity." Moreover, the court stated that a "loss of wages" instruction under circumstances where the plaintiff is unemployed at the time of the injury is "ipso facto erroneous." Carlson v. Drews of Hales Corners, Inc., supra at 417.

The plaintiff is entitled to the lost earning capacity instruction regardless of whether the plaintiff would have chosen to work. "' In determining past and future loss of earning capacity the question is not whether plaintiff would have worked, by choice. He is entitled to compensation for his lost *capacity* to earn, whether he would have chosen to exercise it or not . . .'" See Carlson at p. 417, quoting from Ballard v. Lumbermens Mut. Casualty Co., 33 Wis.2d 601, 608, 148 N.W.2d 65 (1967). In an appropriate case, the court may want to add the following language at the end of the second paragraph:

> It makes no difference whether the plaintiff would have chosen to work or not. (He) (She) is entitled to compensation for (his) (her) lost *capacity* to work, whether (he) (she) would have exercised it or not.

Even though wage loss is an accurate gauge of loss of earning capacity, the court in Carlson said that an instruction for damages in a personal injury suit couched in terms of "loss of wages" is always incorrect. Carlson, supra at 417. The court did note, however, that it is not prejudicial error to phrase the instruction in terms of loss of wages where the only evidence of loss of earning capacity is loss of wages. See also John A. Decker and John R. Decker, "Special Verdict Formulation in Wisconsin," 60 Marq. L. Rev., 201, 267 (1977).

Loss of Earning Capacity - Business Profits. Where an injured plaintiff is the owner and operator of a business, the profits of which are mainly dependent on plaintiff's personal exertions, the profits of the business, along with all other evidence pertaining to the operation of the business, may be considered in determining plaintiff's loss of earning capacity. However, if the income of the business is chiefly the result of capital invested, the labor of others, or other factors than the personal services of the owner, evidence of business profits should not be received. See Featherly v. Continental Ins. Co. 73 Wis.2d 273, 243 N.W.2d 806 (1976).

For delay in obtaining a degree, see Michaels v. Green Giant Co., 41 Wis. 2d 427, 164 N.W.2d 217 (1968); Webster v. Krembs, 230 Wis. 252, 282 N.W. 564 (1939).

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1762 PERSONAL INJURIES: FUTURE LOSS OF EARNING CAPACITY

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for future loss of earning capacity.

If you are satisfied that (plaintiff) has suffered a loss of future earning capacity as a result of the injuries sustained in the accident, your answer to this question will be the difference between what (plaintiff) will reasonably be able to earn in the future in view of the injuries sustained and what (he) (she) would have been able to earn had (he) (she) not been injured.

[Where appropriate add the following paragraph: Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) loss of future earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of (plaintiff)'s services to the business, (and the profits of the business).]

While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of (loss of future earning capacity) requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

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COMMENT

This instruction and comment were approved in 1998 and revised in 2000. The comment was revised in 2002.

Loss of Earning Capacity - Business Profits. Where an injured plaintiff is the owner and operator of a business, the profits of which business are mainly dependent on plaintiff's personal exertions, the profits of the business, along with all other evidence pertaining to the operation of the business, may be considered in determining plaintiff's loss of earning capacity. However, if the income of the business is chiefly the result of capital invested, the labor of others, or other factors than the personal services of the owner, evidence of business profits should not be received. See Featherly v. Continental Ins. Co., 73 Wis.2d 273, 243 N.W.2d 806 (1976).

Evidence of Future Loss. See Comment to Wis. JI-Civil 1760. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1766 PERSONAL INJURIES: PAST PAIN, SUFFERING, AND DISABILITY (DISFIGUREMENT)

(Question _____) (Subdivision _____ of Question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for past pain, suffering, and disability (disfigurement).

Your answer to this (question) (subdivision) should be the amount of money that will fairly and reasonably compensate (plaintiff) for the pain, suffering, and disability (disfigurement) (he) (she) has suffered from the date of the accident up to this time as a result of the accident.

Pain, suffering, and disability (disfigurement) includes any physical pain, humiliation, embarrassment, worry and distress which (plaintiff) has suffered in the past. You should consider to what extent (his) (her) injuries impaired (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life.

COMMENT

This instruction and comment were originally published in 1960 (as JI-Civil 1755). They were revised in 1983 and renumbered and revised in 1998. Editorial corrections were made in 2009.

When, notwithstanding complete recovery at time of trial, there has been a substantial period during convalescence in which plaintiff endured discomfort rather than pain and suffering, in the sense that the latter words connote at least acute discomfort, the word discomfort may be added so that the instruction will relate to "discomfort, pain, and suffering."

When the proof shows curtailment of recreational activities to be of such substantial nature to warrant special mention, add a phrase to include "impairment of his or her ability to enjoy his or her usual pleasurable activities of life."

When evidence is presented that the plaintiff was unconscious for a period of time following the accident, this instruction should be modified to instruct the jury that it should only consider such pain and

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suffering as the plaintiff suffered while conscious. Leibl v. St. Mary's Hosp. of Milwaukee, 57 Wis.2d 227, 203 N.W.2d 715 (1973); Blaisdell v. Allstate Ins. Co., 1 Wis.2d 19, 24, 82 N.W.2d 886 (1957).

In Staehler v. Beuthin, 206 Wis.2d 610 557 N.W.2d 487 (1996), the plaintiff argued that where the jury found liability for her physical injuries, the jury's failure to award anything for pain and suffering showed that justice had been miscarried in the case. The court of appeals rejected this argument concluding that when the jury has answered liability questions unfavorably to the plaintiff, which findings are supported by credible evidence, the granting of inadequate damages to the plaintiff does not necessarily show prejudice or render the verdict perverse. The court of appeals cited Dickman v. Schaeffer, 10 Wis.2d 610, 103 N.W.2d 922 (1960) for the proposition that "in most cases where there are medical bills and loss of services, pain and suffering exist; but we cannot say as a matter of law that this is necessarily true in every case." The court of appeals concluded that a verdict is not inconsistent because it allows damages for medical expenses but denies recovery for personal injuries or pain and suffering. Staehler v. Beuthin, 206 Wis.2d at 623 supra. The court in Staehler said that the jury may well have concluded that the plaintiff's alleged pain and suffering were not related to her injuries from the accident but rather to other causes. It said this issue boiled down to the jury's assessment of the plaintiff's credibility, and the jury was not obligated to find the plaintiff's testimony credible regarding pain and suffering.

For disfigurement, see McCartie v. Muth, 230 Wis. 604, 284 N.W. 529 (1939).

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1767 PERSONAL INJURIES: FUTURE PAIN, SUFFERING, AND DISABILITY (DISFIGUREMENT)

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for future pain, suffering, (and) disability, (and disfigurement).

If you are satisfied that (plaintiff) will endure pain, suffering, (and) disability, (and disfigurement) in the future as a result of the accident, you will insert as your answer to this (question) (subdivision) the sum of money you find will fairly and reasonably compensate (plaintiff) for this future pain, suffering, (and) disability, (and disfigurement).

Pain, suffering, (and) disability, (and disfigurement) includes:

- physical pain
- worry
- distress
- embarrassment
- humiliation

In answering this damage question, you should consider the following factors:

- the extent (plaintiff)'s injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life;
- the nature of (plaintiff)'s injuries;
- the effect the injuries are reasonably certain to produce in the future bearing in mind (plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

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COMMENT

This instruction was approved in 1999.

For future pain and suffering, see Coryell v. Conn, 88 Wis.2d 310, 276 N.W.2d 723 (1979); Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975); Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972); Diemel v. Weirich, 264 Wis. 265, 88 N.W.2d 651 (1953).

For future disability, see Hargrove v. Peterson, 65 Wis.2d 118, 221 N.W.2d 875 (1974); Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 194 N.W.2d 602 (1972); Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 88 N.W.2d 747 (1958).

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1768 PERSONAL INJURIES: PAST AND FUTURE PAIN, SUFFERING, AND DISABILITY (DISFIGUREMENT)

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for any pain, suffering, (and) disability, (and disfigurement) (he) (she) sustained as a result of the accident.

Your answer to this question should be the amount of money that will fairly and reasonably compensate (plaintiff) for the pain, suffering, (and) disability, (and disfigurement) (he) (she) has suffered to date and is reasonably certain to suffer in the future as a result of the accident.

Pain, suffering, (and) disability, (and disfigurement) includes any physical pain, worry, distress, embarrassment, and humiliation which (plaintiff) has suffered in the past and is reasonably certain to suffer in the future.

You should also consider to what extent (his) (her) injuries have impaired and will impair (his) (her) ability to enjoy the normal activities, pleasures, and benefits of life. Finally, consider the nature of (plaintiff)'s injuries, the effect produced by (plaintiff)'s injuries in the past, and the effect the injuries are reasonably certain to produce in the future bearing in mind (plaintiff)'s age, prior mental and physical condition, and the probable duration of (his) (her) life.

COMMENT

This instruction and comment were approved in 1998. This instruction combines both past and future damages. If JI-1766 is given, then this instruction needs to be tailored to limit its coverage to future damages.

For future pain and suffering, see Coryell v. Conn, 88 Wis.2d 310, 276 N.W.2d 723 (1979); Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975); Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972); Diemel v. Weirich, 264 Wis. 265, 88 N.W.2d 651 (1953), and Comment to JI-Civil 1750A.

For future disability, see Hargrove v. Peterson, 65 Wis.2d 118, 221 N.W.2d 875 (1974); Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 194 N.W.2d 602 (1972); Kowalke v. Farmers Mut. Auto Ins. Co., 3 Wis.2d 389, 88 N.W.2d 747 (1958).

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1770 PERSONAL INJURIES: SEVERE EMOTIONAL DISTRESS

[To be added to Wis JI-Civil where appropriate.]

(Plaintiff) claims that (he) (she) suffered severe emotional distress (in addition to the physical injuries (he) (she) sustained) as a result of the (accident) (incident) in question.

If you are satisfied that (plaintiff) suffered severe emotional distress and that the (accident) (incident) was a substantial factor in producing it, you should include in your award a fair and reasonable allowance for the severe emotional distress. If you are not satisfied, make no allowance for the severe emotional distress and confine your award to fair and reasonable compensation only for any other damages (resulting from personal injuries) to (plaintiff) which were caused by the (accident) (incident).

COMMENT

This instruction and comment were originally published in 1969 (as JI-Civil 1752).

This instruction can also be used in conjunction with Wis JI-Civil 1510, Wis JI-Civil 1511, and Wis JI-Civil 2725.

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1780 PERSONAL INJURIES: LOSS OF BUSINESS PROFITS

Instruction Withdrawn.

COMMENT

This instruction was withdrawn in 1998. The issue of loss of business profits is addressed in an optional paragraph in JI-Civil 1760 and 1762.

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1785 PERSONAL INJURIES: PAST LOSS OF PROFESSIONAL EARNINGS

Instruction Withdrawn.

COMMENT

This instruction was withdrawn in 1998. The Committee believes that loss of professional earnings can be properly measured by using JI-Civil 1760 and 1762.

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1788 LOSS OF EARNINGS: DELAY IN OBTAINING DEGREE

Instruction Withdrawn.

COMMENT

The instruction and comment were originally published in their present form in 1971. The comment was reviewed without change in 1990. The instruction was formerly numbered Wis JI-Civil 1708. It was renumbered in 1983. Editorial changes were made in 1992 to address g ender references in the instruction. No substantive changes were made to the instruction.

This instruction was withdrawn in 1999. The concept of the instruction was added to Wis JI-Civil 1760.

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1795 PERSONAL INJURY: LIFE EXPECTANCY AND MORTALITY TABLES

In determining future damages as a result of (plaintiff)'s injuries, you may consider the fact that at this time (plaintiff) is ___ years of age and has a life expectancy of ___ years.

A mortality table which gives the expectancy of life of a person of (plaintiff)'s age was received in evidence as an aid in determining such expectancy. It is not, however, conclusive or binding upon you as to (plaintiff)'s actual or probable expectancy of life. Mortality tables are based upon averages, and there is no certainty that any person will live the average duration of life rather than a longer or shorter period. To determine the probable length of life of (plaintiff), you will consider all of the facts and circumstances established by the credible evidence bearing upon that subject.

COMMENT

This instruction and comment were approved in 1974. The comment was updated in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

The trial court may take judicial notice of tables published by government agencies and may include the figures in instructions to the jury. Donlea v. Carpenter, 21 Wis.2d 390, 124 N.W.2d 305 (1963).

The table referred to in Donlea is the table published in the annual Statistical Abstract of the United States, U.S. Bureau of the Census. In the 1972 edition, it is table No. 76 on page 56. A copy of the table taken from the 1961 Statistical Abstract can be found in Am. Jur. Desk Book, page 356.

See Nolop v. Skemp, 7 Wis.2d 462, 465, 96 N.W.2d 826, 828 (1959); Pedek v. Wegemann, 275 Wis. 57, 68, 81 N.W.2d 49 (1957); Gonzalez v. City of Franklin, 128 Wis.2d 485, 383 N.W.2d 907 (Ct. App. 1986).

See also Hargrove v. Peterson, 65 Wis.2d 118, 221 N.W.2d 875 (1974), in which the trial court properly refused to instruct on the life expectancy of a minor plaintiff.

Hayes, "Use of Mortality Tables in Tort Actions," June 1959 Wis. Bar Bull. 27.

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1796 DAMAGES: PRESENT VALUE OF FUTURE LOSSES

In determining the amount of damages for any loss of _____ which will be incurred by (plaintiff) in the future, you must determine the present worth in dollars of the future damages.

A lump sum of money received today may be worth more than the same sum paid in installments over a period of months or years. This is because a sum received today can be invested and earn money at current interest rates. By making a reduction for the earning power of money, your answer will reflect the present value in dollars of an award of future damages.

This instruction which asks you to reduce future damages to present value does not apply to that portion of future damages which represents future pain and suffering.

COMMENT

The instruction was approved by the Committee in 1978 and revised in 1985, 1992, and 2002. The last paragraph of the instruction was added in 1981. The comment was updated in 1990 and 1992.

The "present value" instruction is ordinarily required in two different fact situations: (1) Where damages are to be awarded for the loss of or the lessening of earning capacity over a period of time in the future. See Johnson v. Pearson Agri-Systems, Inc., 119 Wis.2d 766, 350 N.W.2d 127 (1984); Kramer v. Chicago, M., St. P. & P. R.R., 226 Wis. 118, 276 N.W. 113 (1937); or for the loss of future support for a dependent (as, for example, a widow) in a wrongful death case, see Sweet v. Chicago & N.W. Ry., 157 Wis. 400, 407, 147 N.W. 1054 (1914); Maloney v. Wisconsin Power, Light & Heat Co., 180 Wis. 546, 193 N.W. 399 (1923); McCaffery v. Minneapolis, St. P. & S.S.M. Ry., 222 Wis. 311, 327, 267 N.W. 326, 268 N.W. 872 (1932); (2) A wrongful death case where damages may be awarded for either the loss of or diminution of a future inheritance or in a personal injury case where damages may be awarded to compensate for a future hospital or medical expense.

Ordinarily, cases under (1) involve lost or lessened payments over a period of time, while cases under (2) involve a payment of a lump sum at a particular date in the future.

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The failure to give the "present value" instruction is not deemed prejudicial error unless counsel has specifically requested it. Walker v. Baker, 13 Wis.2d 637, 109 N.W.2d 499 (1961); Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 186, 194 N.W.2d 602 (1972). However, in medical malpractice cases, see Wis. Stat § 893.55(4)(e) and Comment, Wis JI-Civil 1023.

In a period of monetary inflation, the effects of inflation must be taken into account. Cords v. Anderson, 80 Wis.2d 525, 259 N.W.2d 562 (1977). For an instruction on the effects of inflation, see Wis JI-Civil 1797.

The present value of money concept does not apply to an action for breach of contract to loan money where the claimed damage is increased interest payments to be made in the future. Bridgkort Racquet Club v. University Bank, 85 Wis.2d 706, 271 N.W.2d 165 (1978).

It is inappropriate to discount a present sum as if it were a future sum without first accounting for future growth in the asset up to the time of distribution. Bloomer v. Bloomer, 84 Wis.2d 124, 134, 267 N.W.2d 235 (1978).

In Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 552, 361 N.W.2d 297 (Ct. App. 1984), the court said it is improper to measure the present value of future losses by using the cost of an annuity contract. But see Bychinski v. Sentry Ins., 144 Wis.2d 17, 423 N.W.2d 178 (Ct. App. 1988), in which the court of appeals said that the decision in Herman "merely upheld the trial court's exercise of its decision in excluding annuity evidence in that case."

The Committee added the third paragraph in 1981 to apprise the jury that an award for future pain and suffering should not be discounted to present value. The supreme court has recognized that pain and suffering cannot be reduced to any hourly basis or daily basis and that no precise mathematical formula is available for this purpose. See Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). In Affett v. Milwaukee & Suburban Transport. Corp., 11 Wis.2d 794, 106 N.W.2d 274 (1960), the court refused to allow counsel to use a mathematical formula to measure pain and suffering:

> The difficulty in using a mathematical formula to measure damages for pain and suffering is inherent in the nature of pain and suffering. It cannot be measured by any such mathematical standard. Pain and suffering has no market price. It is not bought, sold, or bartered. It has no equivalent in a commercial sense. We cannot agree with the reasoning in the Ratner case, [111 SO.2d 82, 88 (Fla. 1959)], that the absence of a fixed rule for the measurement of pain and suffering supplies a reason for the use of a mathematical formula. The present rule for measuring damage is as fixed as the nature of the subject matter will permit. True, counsel should be entitled to a reasonable latitude in argument and in commenting on the evidence, its nature and effect, and may make proper inferences which may reasonably arise from the evidence. However, we fail to see where a mathematical formula or a pain-on-a-per-diem or per-month basis has its basis in the evidence, or in logical inferences from the evidence. Such arguments are beyond the scope of proper argumentation.

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1797 DAMAGES: EFFECTS OF INFLATION

In computing the amount of future economic damages, you may take into account economic conditions, present and future, and the effects of inflation.

COMMENT

This instruction was previously numbered Wis JI-Civil 1702. The instruction and comment were initially approved by the Committee in 1978. The comment was updated in 1992.

This instruction is based on the decision in Dabareiner v. Weisflog, 253 Wis. 23, 29-30, 33 N.W.2d 220 (1948). "Inflation may be taken into account by the fact finder as a separate factor to arrive at an amount that will fairly compensate the victim for required future medical expenses." Cords v. Anderson, 80 Wis.2d 525, 551, 259 N.W.2d (1977). See also Maskrey v. Volkswagenwerk Aktiengesellschaft, 126 Wis.2d 267, 376 N.W.2d 89 (Ct. App. 1985).

The instruction would not be proper in a situation where the value of money has stabilized. Kincannon v. National Indem. Co., 5 Wis.2d 231, 92 N.W.2d 884 (1958).

The court of appeals has stated in reviewing Wis JI-Civil 1796 and 1797 that "once a jury has discounted a future loss to present value, taking inflation into account, its task has been accomplished. The jury is not instructed to take into account how much can then be earned with the discounted sum." Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 552, 361 N.W.2d 297 (Ct. App. 1984). Thus, it was permissible for the trial judge to exclude testimony on the cost of an annuity. But see Bychinski v. Sentry Ins., 144 Wis.2d 17, 423 N.W.2d 178 (Ct. App. 1988).

Medical Malpractice Cases. For determining future economic damages in medical malpractice claims, see Wis. Stat. § 893.55(4)(e) which provides:

> (e) Economic damages recovered under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, shall be determined for the period during which the damages are expected to accrue, taking into account the estimated life expectancy of the person, then reduced to present value, taking into account the effects of inflation.

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1800 PROPERTY: LOSS OF USE OF REPAIRABLE AUTOMOBILE

In answer to question _____, if you find that (plaintiff) could not use (his) (her) automobile because of the (e.g., collision), insert the amount that will reasonably compensate (plaintiff) for the loss of its use.

You may consider the reasonable cost to rent a comparable automobile during the period of time reasonably necessary to repair the automobile (or to determine whether the automobile could be repaired), but this cost may not exceed the amount (plaintiff) spent or incurred to rent a temporary replacement.

COMMENT

This instruction and comment were approved in 1977 and revised in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 600-601, 182 N.W.2d 448 (1971).

Recovery for Renting a Comparable Automobile. A plaintiff whose automobile was damaged is entitled to the reasonable value of the loss of use even though he or she did not acquire a temporary replacement vehicle. Kim v. American Family Mut. Ins. Co., 176 Wis.2d 890, 501 N.W.2d 24 (1993), see also Schrubbe v. Peninsula Veterinary Service, 204 Wis.2d 37, 552 N.W.2d 634 (Ct. App. 1996). The plaintiff in Schrubbe unsuccessfully argued that Kim stood for the proposition that the financial circumstances of each individual plaintiff must be examined before a rule of damages can be applied. In rejecting this argument, the court said that under the proper measure of damages, when a motor vehicle is damaged, the owner of the vehicle is entitled to loss of use of the motor vehicle for a reasonable period of time necessary to repair the vehicle or obtain a comparable permanent replacement. This measure of damages is available to all persons who suffer the loss of a motor vehicle without regard to whether a temporary replacement vehicle was obtained and without regard to the reasons a temporary replacement vehicle may not have been obtained. The plaintiff in Schrubbe also argued that the rule of damages varies based upon the personal wealth of the injured plaintiff. The court rejected this argument and held that the general rule is that damages are measured the same without regard to the plaintiff's wealth. The court agreed, however, that when the measure of damages includes the calculation of a reasonable time to replace, the plaintiff's ability to pay may be a factor in determining the reasonableness of the time to replace. Citing Nashban Barrel & Container Co. v. G.G. Parsons Trucking Co., supra. However, the court of appeals said it was inappropriate to evaluate the reasonable time to replace for a loss of use determination because the calves in Schrubbe were not producing income at the time of their death. Thus, the plaintiff would not suffer loss of use of the calves in the brief period necessary to acquire replacement calves in the market. Because the measure of damages in such a case does not include a reasonableness determination, the wealth of the plaintiff was not a proper consideration.

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1800 PROPERTY: LOSS OF USE OF REPAIRABLE AUTOMOBILE

In answer to question _____, if you find that (plaintiff) could not use (his) (her) automobile because of the (e.g., collision), insert the amount that will reasonably compensate (plaintiff) for the loss of its use.

You may consider the reasonable cost to rent a comparable automobile during the period of time reasonably necessary to repair the automobile (or to determine whether the automobile could be repaired), but this cost may not exceed the amount (plaintiff) spent or incurred to rent a temporary replacement.

COMMENT

This instruction and comment were approved in 1977 and revised in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 600-601, 182 N.W.2d 448 (1971).

Recovery for Renting a Comparable Automobile. A plaintiff whose automobile was damaged is entitled to the reasonable value of the loss of use even though he or she did not acquire a temporary replacement vehicle. Kim v. American Family Mut. Ins. Co., 176 Wis.2d 890, 501 N.W.2d 24 (1993), see also Schrubbe v. Peninsula Veterinary Service, 204 Wis.2d 37, 552 N.W.2d 634 (Ct. App. 1996). The plaintiff in Schrubbe unsuccessfully argued that Kim stood for the proposition that the financial circumstances of each individual plaintiff must be examined before a rule of damages can be applied. In rejecting this argument, the court said that under the proper measure of damages, when a motor vehicle is damaged, the owner of the vehicle is entitled to loss of use of the motor vehicle for a reasonable period of time necessary to repair the vehicle or obtain a comparable permanent replacement. This measure of damages is available to all persons who suffer the loss of a motor vehicle without regard to whether a temporary replacement vehicle was obtained and without regard to the reasons a temporary replacement vehicle may not have been obtained. The plaintiff in Schrubbe also argued that the rule of damages varies based upon the personal wealth of the injured plaintiff. The court rejected this argument and held that the general rule is that damages are measured the same without regard to the plaintiff's wealth. The court agreed, however, that when the measure of damages includes the calculation of a reasonable time to replace, the plaintiff's ability to pay may be a factor in determining the reasonableness of the time to replace. Citing Nashban Barrel & Container Co. v. G.G. Parsons Trucking Co., supra. However, the court of appeals said it was inappropriate to evaluate the reasonable time to replace for a loss of use determination because the calves in Schrubbe were not producing income at the time of their death. Thus, the plaintiff would not suffer loss of use of the calves in the brief period necessary to acquire replacement calves in the market. Because the measure of damages in such a case does not include a reasonableness determination, the wealth of the plaintiff was not a proper consideration.

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Krueger v. Steffen, 30 Wis.2d 445, 449, 141 N.W.2d 200 (1966); 8 Am. Jur. 2d Automobiles § 607-610, paragraphs 1047-1048.

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1801 PROPERTY: LOSS OF USE OF NONREPAIRABLE AUTOMOBILE

In answer to question _____, if you find that (plaintiff) could not use (his) (her) automobile because of the _____, insert the amount that will reasonably compensate (plaintiff) for the loss of its use.

You may consider the reasonable cost to rent a comparable automobile during a reasonable period of time necessary to obtain a permanent replacement (including time to determine whether the automobile could be repaired), but this cost may not exceed the amount (plaintiff) spent or incurred to rent a temporary replacement.

COMMENT

This instruction and comment were approved in 1977 and revised in 1997. Editorial changes were made in 1992 to address gender references in the instruction.

Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 600-601, 182 N.W.2d 448 (1971); Krueger v. Steffen, 30 Wis.2d 445, 449, 141 N.W.2d 200 (1966); 8 Am. Jur. 2d Automobiles § 607-610, paragraphs 1047-1048. See Comment to JI-Civil 1800.

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1803 PROPERTY: DESTRUCTION OF PROPERTY

Question ____ asks what amount will reasonably compensate (plaintiff) for the destruction of (his) (her) _____ as a result of _____.

When property, such as (type), has been destroyed, compensation to the owner is measured by the fair market value of the property at the time and place of its destruction. "Fair market value" is the amount property will sell for where the owner is willing but not required to sell the property to a buyer willing but not required to buy the property.

[Note: Use this paragraph when there is a question whether the property had a market value: (If) (Since) the property had no market value at the time of its destruction, compensation to the owner is measured by the value of the property to the owner at the time of its destruction. In determining the value of the (property) to the (plaintiff), you should consider: the nature of the property, its use, age, original cost and depreciation, the cost to replace the property [if the property can be replaced], and all other facts and circumstances received in evidence which bear on the value of the property to the (plaintiff).]

[You should not consider any sentimental value which (plaintiff) may have attached to the property.]

COMMENT

This instruction and comment were originally published in 1963. They were revised in 1983, 1997, and 2010.

Market Value. Paragraph three should be used where there is a question whether the property had a market value. If the court determines as a matter of law that the property had no market value, paragraph two should not be used and the word "since" should be substituted for the word "if" at the beginning of paragraph three. The last sentence in paragraph three should be used only if appropriate.

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Partial destruction is not applicable to cases of total destruction. Steel v. Ritter, 16 Wis.2d 281, 114 N.W.2d 436 (1962).

See Schwalbach v. Antigo Elec. & Gas, Inc., 27 Wis.2d 651, 135 N.W.2d 263 (1965). Harvey v. Wheeler Transfer and Storage Co., 227 Wis. 36, 277 N.W. 627 (1938); Webber v. Wisconsin Power & Light Co., 215 Wis. 480, 255 N.W. 261 (1934); Allen v. Chicago N.W. Ry., 145 Wis. 263, 129 N.W. 1094 (1911).

For a discussion of determining damages to property which has no market value, see Town of Fifield v. State Farm Ins. Co., 119 Wis.2d 220, 349 N.W.2d 684 (1984).

Destruction of Livestock. The basic measure of damages for the destruction of livestock is the animal's market value, determined by replacement cost, with a reduction of any salvage value. Nelson v. Boulay Bros. Co., 27 Wis.2d 637, 643-44, 135 N.W.2d 254 (1965); Rosche v. Wayne Feed, Continental Grain, 152 Wis.2d 78, 447 N.W.2d 94 (Ct. App. 1989). Damages for loss of future births are not recoverable since to do so would result in a duplicate recovery. The afflicted animal's ability to reproduce is considered when the fact finder assesses its market value. Nelson v. Boulay Bros. Co., supra at 644. Lost profit is not the basic measure of damages for livestock that are injured or destroyed. Rosche, supra.

Injury to Livestock. The basic measure of damages for an injured animal is the difference between its market value before and after the injury. Lost profit is not the basic measure of damages for livestock that are injured or destroyed. Rosche, supra.

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1804 PROPERTY: DAMAGE TO REPAIRABLE PROPERTY

When property, such as (type), has been damaged and can be repaired, the loss to the owner is determined by one of two measures of damage. The first measure is the "Fair Market Value" rule. This rule measures the difference between the fair market value of the property immediately before the _____ and its fair market value immediately after the _____. "Fair market value" is the amount property will sell for where the owner is willing but not required to sell the property to a buyer willing but not required to buy the property.

The second measure of damage is the "Cost of Repair" rule. If the property can be restored to its condition before the _____, compensation to the owner is measured by the reasonable cost of the repairs necessary to restore the property to its prior condition. The measure under this second rule is the reasonable cost to restore the property to its former condition, not what may have been the actual cost of repair. [**Note: In a case involving loss of value following repairs, give the following:** If repairs (will) (did) not restore the (property) to its pre-injury value and (plaintiff) proves that (he) (she) (will be) (has been) harmed by a loss in value, then (plaintiff) is entitled to damages for this loss in value and you should add the loss in value to the cost of repairs in determining the total loss to (plaintiff). [The total damages cannot exceed the pre-injury fair market value of the (property.)]]

If the evidence allows you to apply both of these rules, and if in applying them you arrive at two different figures, your answer to question ___ should be the lower of the two figures.

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[If the property had no market value at the time of the _____, you should apply the cost of repair rule. Your answer to question ___ should be the reasonable cost of the repairs necessary to restore the property to its condition just prior to the _____.]

COMMENT

This instruction and comment were approved in 1977 and revised in 1997 and 2010.

Real Property and Personal Property. The committee concludes that the rule of damages explained in this instruction applies to both destroyed real property and personal property. See Hellenbrand v. Hilliard, 2004 WI App 151, 275 Wis.2d 741, 687 N.W.2d 37.

A. WHERE PROPERTY HAS MARKET VALUE

If there is evidence both as to cost of restoration and as to diminution in market value, use paragraphs one, two, and three.

Where property is not destroyed, one measure of damages is the difference between the value before and the value after; a second measure is what it would reasonably cost to put the property in such condition as it was before the _____ — not the actual cost of repair. Chapleau v. Manhattan Oil Co., 178 Wis. 545, 190 N.W. 361 (1922); Vetter v. Rein, 203 Wis. 499, 234 N.W. 712 (1931); Steel v. Ritter, 16 Wis.2d 281, 114 N.W.2d 436 (1962).

The correct rule in case of partial loss is either diminution in value of the property damaged or the cost of restoration. The plaintiff may introduce evidence as to either measure. If the defendant wants another theory applied, it is his or her duty to offer evidence on it. Engel v. Dunn County, 273 Wis. 218, 77 N.W.2d 408 (1956).

The owner of a damaged building may recover the entire cost of restoration to its former condition but not in excess of the diminution in value. Zindell v. Central Mut. Ins. Co., 222 Wis. 575, 269 N.W. 327 (1936).

The court received evidence of the cost of repairs of the building and the diminution in value and adopted the lesser of the two. This was the correct rule. Hickman v. Wellauer, 169 Wis.18, 28, 171 N.W. 635 (1919).

The plaintiff offered proof as to the cost of repairs. The defendant offered no proof. "This state of the evidence furnished the Circuit Court but one basis on which to calculate the damages, namely, the cost of repairs." This was not error. Mueller Real Estate Inv. Co. v. Cohen, 158 Wis. 461, 149 N.W. 154 (1914).

Where only a portion of a machine is damaged and repairs are necessary before any of it can be used, the reasonable cost or value of the repairs is the proper measure of damages. The Mueller case and the

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Zindell case are cited. L. L. Richards Mach. Co. v. McNamara Express Co., 7 Wis.2d 613, 97 N.W.2d 396 (1959).

Where a luxury item is being taken into a special market for resale and is damaged in transit, the loss of market value, rather than the cost of repair, is the proper measure of damages. Cruis Along Boats, Inc., v. Standard Steel Prods. Mfg. Co., 22 Wis.2d 403, 123 N.W.2d 85 (1964).

B. WHERE PROPERTY HAS NO MARKET VALUE

If there is a partial loss, but the property has no ascertainable market value, use paragraph four only with appropriate introduction. The measure of damages is the reasonable cost of making such repairs as will restore the property to its former condition. Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 182 N.W.2d 448 (1971).

C. WHERE PROPERTY HAS NO LOCAL MARKET VALUE

The fact that no market existed in the place of use is immaterial if a market existed nearby; the jury in figuring the damages should have allowed the market value as it actually existed at the time of destruction, plus the cost of transportation from the market to the place of use. Weber v. Wisconsin Power and Light Co., 215 Wis. 480, 255 N.W. 261 (1934).

In such a situation, the following paragraph may be used:

> If the property under consideration had no market value at the time and place where it was damaged but had a market value at a location within a reasonable distance away, you will consider such market value, together with the costs of transportation from such location to the place of damage, in determining the difference between the market value of the property before and the market value after the damage occurred.

D. DIMINISHED VALUE AFTER REPAIRS

If repairs to damaged property have not restored the property to its preinjury value, the plaintiff is entitled to damages for the lost value in addition to damages for the reasonable costs to repair the property. Hellenbrand v. Hilliard, 2004 WI App 151, 275 Wis. 2d 741. This concept was added to the instruction in 2010 when the bracketed language in the second paragraph was added. This note assumes that the cost of repairs and diminished value after repair are less than the diminishment in fair market value after the accident.

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1805 PROPERTY: DAMAGE TO NONREPAIRABLE PROPERTY

When property, such as (type), has been damaged and cannot be economically repaired, the loss to the owner is determined by the "Fair Market Value" rule. This rule measures the difference between the fair market value of the property immediately before the _____ and its fair market value immediately after the _____.

"Fair market value" is the amount property will sell for where the owner is willing but not required to sell the property to a buyer willing but not required to buy the property.

Evidence of the reasonable cost of repairs may be considered by you in determining the decrease in the fair market value of the (property) as a result of the _____.

COMMENT

This instruction and comment were approved in 1977 and revised in 1997 and 2010.

See Comment to Wis JI-Civil 1804.

For definition of "market value," see Kremer v. Rule, 216 Wis. 331, 257 N.W. 166 (1934).

Reasonable cost of repair may be shown as bearing upon the diminution in the value of the vehicle resulting from the injury. McCormick, Damages § 124 at 472 (1935); Krueger v. Steffen, 30 Wis.2d 445, 449, 141 N.W.2d 200 (1966); Chapleau v. Manhattan Oil Co., 178 Wis. 545, 550, 190 N.W. 361 (1922); Vetter v. Rein, 203 Wis. 499, 502, 234 N.W. 712 (1931).

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1806 PROPERTY: DAMAGE TO A GROWING CROP

Question ___ asks what amount will reasonably compensate (plaintiff) for the damage to (his) (her) (type of crop).

Under normal conditions, a growing crop will mature and be sold for a certain price. When a growing crop is damaged, reasonable compensation to the owner is measured by the difference between the probable market value the original crop would have brought at maturity if it had not been damaged and the amount brought by the actual crop. From this difference, however, you should deduct the expenses the (plaintiff) saved by not having to cultivate, harvest, and market the damaged portion of the crop.

In determining the probable market value of (plaintiff's) original crop, you should consider the crop production figures on the land in other years and the average of these production figures. You may also consider the market value of undamaged (type of crop) from other fields in the same area in the year (plaintiff)'s crop was damaged.

In comparing the damage crop with crop projection figures in other years or crop production from other fields in the area in the same year, you may consider variations in weather conditions, variations in planting and cultivation methods, and any other factors which might affect production.

The determination of damages to growing crops cannot always be made with mathematical precision; you should award as damages, however, an amount which will fairly compensate (plaintiff) for the loss.

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COMMENT

This instruction and comment were approved by the Committee in 1981 and revised in 1997.

Cutler Cranberry Co. v. Oakdale Elec. Coop., 78 Wis.2d 222, 254 N.W.2d 234 (1977); First Wisconsin Land Corp. v. Bechtel Corp., 70 Wis.2d 455, 235 N.W.2d 288 (1975); Peacock v. Wisconsin Zinc Co., 177 Wis. 510, 188 N.W. 641 (1922). See also Strauss Bros. Packing Co. v. American Ins. Co., 98 Wis.2d 706, 298 N.W.2d 108 (Ct. App. 1980); Kolbeck v. Rural Mut. Ins. Co., 70 Wis.2d 655, 235 N.W.2d 466 (1975).

The first sentence of the instruction is taken from the decision in Peacock, supra at 514. In its decision, the court stated that the valuation of damages to growing crops must recognize that "a growing crop as such is valuable mainly by reason of potentialities," and that "its present value is therefore determined very largely by reference to that fact."

Because of this potential for increase in value, the use of replacement cost for the plants at the time of injury to measure the damage is not appropriate. In this regard, animal damage cases provide an excellent analogy. In fact, a court of appeals in Strauss Bros. Packing Co., supra at 708, stated that growing crops closely parallel growing livestock in that "each has a reasonable potential for increase in value." As to using replacement cost to value damage to animals, the supreme court has stated:

> . . . the proper measurement of value for animals is their replacement cost reflected in the market value at time of loss, unless they are expected to show a marked increase in the future (pelting minks for example). . . .
>
> Kolbeck, supra at 709; see also Brunette v. Slezewski, 34 Wis.2d 313, 149 N.W.2d 578 (1967).

In Brunette, the court distinguished, for purposes of measuring damages, between mink being raised as pelters and mink being raised as breeders. The court considered whether damages should be measured on the market value of mink at pelting age or whether such damages would be computed from replacement cost at the time of the wrong. The court held that market value should be based upon the value at pelting age because pelters have a "marked increase in market value." Conversely, because the value of a breeder is more stable, the court said damage from loss of a breeder is measured by the reasonable cost of replacing the mink with a comparable animal. By analogy, therefore, if a crop is comprised of plants which will have a relatively stable value for a period of time, then the replacement cost method would be more appropriate for measuring damages to that crop.

Evidence of crop production in other years is not too speculative or conjectural to be admissible, even though growing conditions vary from year to year. The Wisconsin Supreme Court has stated that differences between years in weather conditions and other factors which impact on productivity do not go to the admissibility of evidence of crop production in other years but only to its weight and sufficiency. Cutler, supra at 231. This same evidentiary treatment applies to evidence which seeks to compare the yield of the injured crop with the yield of crops on similar lands in the same locality during the same year.

Although damages must be proven with reasonable certainty, there is no absolute requirement of mathematical precision in measuring crop damage. Where the fact of damages is clear and certain, but there is uncertainty as to the exact amount of damages, the trier of fact has discretion to fix a reasonable amount. Cutler, supra at 235.

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For a discussion of the rule of certainty in determining damages, see Town of Fifield v. State Farm Ins. Co., 119 Wis.2d 220, 349 N.W.2d 684 (1984). In that decision, the court said, at page 230, that even where the rule of certainty is applicable as an ideal in terms of a device to control juries, the following modifications are applicable:

> (a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference.
> (b) Where the defendant's wrong has caused the difficulty of proof of damage, he or she cannot complain of the resulting uncertainty.
> (c) Mere difficulty in ascertaining the amount of damage is not fatal.
> (d) Mathematical precision in fixing the exact amount is not required.
> (e) If the best evidence of the damage of which the situation admits is furnished, this is sufficient. McCormick, Damages, § 27, p.101.

It is also important that the trier of fact consider the cost savings which inure to the plaintiff by reason of being relieved of raising the damaged crops to maturity. Bechtel, supra at 463-64; Strauss Bros. Packing Co., supra at 709-10.

This rule for measuring damages may not apply where there is permanent destruction to perennial plants. See 21 Am. Jur. 2d Crops § 80 (1979). For timber loss, see Miller v. Neale, 137 Wis. 426, 119 N.W. 94 (1909).

For the destruction of ornamental trees, see Otto v. Cornell, 119 Wis.2d 4, 349 N.W.2d 703 (Ct. App. 1984); Gilman v. Brown, 115 Wis. 1, 91 N.W. 227 (1902).

There is no case law in Wisconsin on the specific obligation of a farmer to mitigate damages following an injury to a growing crop. Cases in other jurisdictions hold that a replanting must be undertaken where practical. 21 Am. Jur.2d Crops § 81; 20 Proof of Facts 2d, § 15, n. 80 (1979). In such a case, the defendant would be entitled to have credited to his or her liability the amount of any net gain realized from the second crop. In Wisconsin, however, courts have refused to force an injured party to mitigate losses, if "the effort, risk, sacrifice, or expense which the injured party must incur to avoid or minimize the loss or injury is such that a reasonable person under the circumstances might decline it." Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis.2d 749, 266 N.W.2d 382 (1978); Sprecher v. Weston's Bar, Inc., 78 Wis.2d 26, 44-49, 253 N.W.2d 493 (1977).

Livestock. The basic measure of damages for the destruction of livestock is the animal's market value, determined by replacement cost, with an appropriate reduction for any salvage value. Schrubbe v. Peninsula Veterinary Service, 204 Wis.2d 37, 552 N.W.2d 634 (Ct. App. 1996), citing Rosche v. Wayne Feed Division, 152 Wis.2d 78, 447 N.W. 2d 94 (Ct. App. 1989). In Rosche, the court specifically addressed the issue whether the owner was entitled to damages for the loss of their offspring anticipated at the time of their death. The court disallowed damages for the loss of future offspring and limited the damages to the replacement cost at the time of their death less any salvage value. In Schrubbe the court did not address the issue whether the market value of the calves which died should be calculated as of the date it was reasonable to replaced the deceased calves. It could be argued the court said in a footnote that the market value of the plaintiff's calves should be calculated at the time it was reasonable to replace them, less the cost to raise the calves to that point. In Schrubbe the trial court declared that the appropriate measure of damages for the deaths of dairy calves was the market replacement value on their date of death, less any salvage value. The plaintiff contended that because he was financially unable to replace the calves on the date of their death, he was entitled to recover for anticipated lost milk profits the calves ultimately would have produced. The court rejected this argument. The court said the reasons

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underlying the general rule of damages are at least three fold. First, the market value of replacement animals is based in part upon their expected future productivity. Because future productivity is considered in assessing market value of livestock, additional recovery for the expected future productivity of the livestock would duplicate damages. Once the owner acquires a replacement animal, the loss of future productivity is eliminated. If future productivity were allowed together with the replacement cost, the owner would be twice compensated for the future productivity of the animal. The court in Schrubbe also held that the measure of damages stated in Rosche is also designed to minimize damages and avoid economic waste. The rule excludes recovery for damages that should have been avoided and deemed economically wasteful. By acquiring replacement animals, livestock productivity will be maintained and the damages measured in a way that will not exceed the economic potential of the lost property. Finally, the court in Schrubbe said the rule of damages set forth in Rosche reflects the fact that an animal's value is readily ascertainable and its replacement is readily available in the market. The court in Schrubbe recognized that the rule of damages reflected by Rosche was limited to livestock that is not producing income at the time of the loss. If the plaintiff lost milk-producing cows, some amount of milk production would be lost from the time of death to the time it was reasonable to replace the cows. Although the time to replace may be brief because of the availability of comparable animals in the market, the owner would be entitled nevertheless to the loss of use of the animal during the reasonable time necessary to replace it.

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1810 TRESPASS: NOMINAL DAMAGES

If you find that (Defendant) trespassed upon (Plaintiff)'s property, but do not find that (Plaintiff) has sustained measurable damages from the trespass, then your answer to Question _____ may be a nominal sum such as one dollar. A nominal damage award recognizes that although actual damages are immeasurable in dollars, actual harm to the property rights of (Plaintiff) has occurred from the trespass by (Defendant).

COMMENT

This instruction and comment were approved in 2012.

See Jacque v. Steenburg Homes, Inc., 209 Wis.2d 605, 563 N.W.2d 154 (1997).

Nominal damages are always appropriate for a trespass. Jacobs v. Major, 139 Wis.2d 492, 407 N.W.2d 832 (1987). If proved, compensatory damages may also be awarded. Grygiel v. Monches Fish & Game Club, Inc., 2010 WI 93, 328 Wis.2d 436, 787 N.W.2d 6.

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1812 QUANTUM MERUIT: MEASURE OF SERVICES RENDERED

If you find that (name), in good faith, rendered services to (name), you will award (name) the reasonable value of such services, being the customary rate of pay for the work in the community at the time the work was performed.

COMMENT

This instruction and comment were originally published in 1960. They were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This measure of damages was approved in Barnes v. Lozoff, 20 Wis.2d 644, 123 N.W.2d 543 (1963), and Mead v. Ringling, 266 Wis. 523, 64 N.W.2d 222 (1954). See also Estate of Voss, 20 Wis.2d 238, 121 N.W.2d 744 (1963); Fieldhouse Landscape v. Gentile, 12 Wis.2d 418, 107 N.W.2d 491 (1961); Guentner v. Gnagi, 258 Wis. 383, 46 N.W.2d 194 (1951).

The value of the services may be recovered even though rendered under an invalid and unenforceable contract. Theuerkauf v. Sutton, 102 Wis.2d 176, 197, 306 N.W.2d 651 (1981); Mead v. Ringling, supra.

Wis. Stat. § 893.44 (1979) limits recovery of compensation to two years where there was no express agreement as to compensation and recovery is based upon quantum meruit. Estate of Nale, 61 Wis.2d 654, 213 N.W.2d 552 (1974).

The supreme court has recognized that the principle that "where one renders valuable services for another payment is expected" is "well-grounded in human experience." In Matter of Estate of Steffes, 95 Wis.2d 490, 500, 290 N.W.2d 697 (1980). The court further noted in that decision that "if one merely accepts services from another which are valuable to him, in general, the presumption of fact arises that a compensation equivalent is to pass between the parties." Steffes, supra at 500.

Recovery in quantum meruit is allowed for services performed for another on the basis of a contract implied in law to pay the performer for what the services were reasonably worth. However, before recovery can be permitted on quantum meruit, there must be sufficient competent evidence in the record which shows that the services were performed at the instance of the person to be charged and that the performer expected reasonable compensation. In Matter of Estate of Lade, 82 Wis.2d 80, 260 N.W.2d 665 (1978); Gename v. Benson, 36 Wis.2d 370, 376, 153 N.W.2d 571 (1967).

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1815 INJURY TO SPOUSE: LOSS OF CONSORTIUM

"Consortium" involves the love and affection, the companionship and society, the privileges of sexual relations, the comfort, aid, advice and solace, the rendering of material services, the right of support, and any other elements that normally arise in a close, intimate, and harmonious marriage relationship. A wrongful invasion, impairment, or deprivation of any of these rights, resulting from a disabling injury to a spouse, is a legal loss and a basis for damages to the other spouse harmed or deprived.

In answering this question, you should consider the nature, the form, and quality of the relationship that existed between (the spouses) up to the time of the injury. Based on that relationship, determine what sum will represent fair and reasonable compensation for any loss of consortium that was sustained by the deprived spouse as a result of the injury.

If you find that the loss will continue in the future, include in your answer damages for the period you are convinced it will continue to exist.

Compensation for loss of consortium, except as it relates to material services, is not measured by any rule of market value. Instead, it is measured on the basis of what you find is fair and reasonable compensation for the loss sustained by the deprived spouse. Compensation for material services is to be measured by what it would reasonably cost in the market for like services.

So as not to duplicate damages, do not include in your answer any allowance for loss of earnings or loss of earning capacity of the injured spouse. Those damages are dealt with in another question.

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COMMENT

The instruction and comment were originally published in 1978 and revised in 1984. The comment was updated in 1987, 1990, and 2011. An editorial correction was made in the comment in 1999.

The instruction was cited with approval in Kottka v. PPG Ind., Inc., 130 Wis.2d 499, 520, 388 N.W.2d 160 (1986).

In Ballard v. Lumbermen's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966), the court included "sexual companionship" as an element for the concept of consortium. In Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 185 (1967), the right of action for loss of consortium resulting from her husband's injury was extended to a wife. This case overruled Nickel v. Hardware Mut. Casualty Co., 269 Wis. 647, 70 N.W.2d 205 (1955). There is no longer need to join the causes of action for injury and loss of consortium. See Fitzgerald v. Meissner & Hicks, Inc., 38 Wis.2d 571, 157 N.W.2d 595 (1968), which also includes suggested devices for avoiding double or duplicate recoveries.

Loss of consortium creates a derivative separate and independent cause of action resulting from the injuries to a spouse. Schwartz v. City of Milwaukee, 54 Wis.2d 286, 195 N.W.2d 480 (1972); Peeples v. Sargent, 77 Wis.2d 612, 643, 253 N.W.2d 459 (1977). A spouse's causal negligence can be imputed to the other spouse to reduce or defeat recovery for loss of consortium. White v. Lunder, 66 Wis.2d 563, 225 N.W.2d 442 (1975); Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 234 N.W.2d 332 (1975). However, any other defenses (e.g., exculpatory contract) to the injured spouse's action are not available to release a spouse's consortium rights. Arnold v. Shawano County Agricultural Soc'y, 111 Wis.2d 203, 214-15, 330 N.W.2d 773 (1983).

The life expectancy of the spouse is an element for consideration in determining compensation for loss of consortium. Shockley v. Prier, 66 Wis.2d 394, 225 N.W.2d 495 (1975). For basis of determining damages for loss of consortium with respect to the several elements, see Selleck v. City of Janesville, 104 Wis. 570, 80 N.W. 944 (1899). As to the relevance of testimony on the injured spouse's marital and family problems, see Strelecki v. Firemans Ins. Co. of Newark, 88 Wis.2d 464, 276 N.W.2d 464 (1979).

Loss of Earnings as a Homemaker. In Lambert v. Wrensch, 135 Wis.2d 105, 399 N.W.2d 369 (1987), the supreme court held that the reference in this instruction to "the rendering of material services" covers the loss of the injured spouse's services as a homemaker. Therefore, giving a separate instruction on the injured spouse's loss of earnings as a homemaker would overlap with recovery for loss of consortium and result in a double recovery.

Negligence of Long-Term Care Provider. Wis. Stat. § 893.555(4), limits the recovery for loss of consortium of a spouse in cases involving the negligence of a long-term care provider to the amount set forth in Wis. Stat. § 893.55(4)(d) (2011 Wisconsin Act 2).

Fiancee. Loss of consortium suffered by a fiancee of an injured person is not compensable under Wisconsin law. Denil v. Integrity Mut. Ins., 135 Wis.2d 373, 401 N.W.2d 13 (Ct. App. 1986).

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1816 INJURY TO SPOUSE: PAST LOSS OF EARNING CAPACITY: HOUSEHOLD SERVICES

In your answer to subdivision _____ of question ___, if you find that as a result of the injuries sustained by (plaintiff), (he) (she) was unable to carry on (his) (her) normal household services from the date of the accident to the present date, you should allow such sum as you feel will fairly and reasonably compensate (him) (her) for the household services (he) (she) was unable to perform, not exceeding the amount for which (he) (she) could have employed other people to do the work.

COMMENT

This instruction and comment was approved by the Committee in 1992.

This instruction is to be used in cases where an injured spouse seeks compensation for his or her inability to perform household services from the date of the accident to date of trial. Conceptually, the claim is based on a past loss of earning capacity.

Case law does not seem to rule out the legality of such an instruction. The only case directly focusing on the problem, Lambert v. Wrensch, 135 Wis. 2d 105, 399 N.W.2d 369 (1987), held that, because plaintiff's husband had a claim for loss of consortium which included loss of material services, plaintiff wife could not recover for her inability to do household chores. The Court ruled that to allow for such loss would constitute a double recovery.

In the case of Zintek v. Perchik, 163 Wis. 2d 439, 471 N.W.2d 522 (Ct. App. 1991), the plaintiff wife worked outside the home. There was testimony concerning her past wage loss. In addition, expert testimony established the value of household services which she normally would have performed had she not been injured. The appellate court upheld the jury award which combined a recovery of both elements. The appeal was based solely on the sufficiency of the evidence. In a footnote, the court indicated it did not address the Lambert problem - whether recovery for plaintiff's loss of household services was included in her husband's recovery for loss of consortium. (Zintek, supra at 481 n.22.)

It appears that Wisconsin appellate courts have tacitly approved a plaintiff's recovery for loss of ability to perform household services if the loss of consortium claim of the spouse does not include recovery for "material services." In a given case, a request by plaintiff's lawyer for jury verdict questions as to past loss of household services and loss of future ability to perform such services can be honored by amending the loss of consortium instruction.

If this instruction is used along with JI-Civil 1815, then delete the term "material services" from JI-Civil 1815.

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1817 INJURY TO SPOUSE: FUTURE LOSS OF EARNING CAPACITY: HOUSEHOLD SERVICES

Question _____ asks what sum of money will fairly and reasonably compensate (plaintiff) for loss of (his) (her) ability to perform household services in the future.

If you are satisfied that (plaintiff) has suffered an impairment of (his) (her) ability to perform household services in the future as a natural consequence of (his) (her) injuries, you should allow such sum as you feel will fairly and reasonably compensate (him) (her) for the impairment. The amount, if any, to be awarded by you should not exceed the amount for which (he) (she) will have to employ other people to perform the services.

While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of loss of future earning capacity requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

This instruction and comment were approved by the Committee in 1992 and revised in 2000. See Committee Comment to JI-Civil 1816.

Evidence of Future Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1820 INJURY TO SPOUSE: NURSING SERVICES: PAST AND FUTURE

Subdivision ___ of question ___ asks what sum of money will compensate (name) for personal nursing care and services rendered to (his wife) (her husband). If you find that (name) performed services in nursing and caring for (his wife) (her husband) and that the services were necessarily rendered because of (her) (his) injuries, you should name such sum as you feel will fairly and reasonably compensate (name) for the personal nursing care and services, not exceeding the amount for which (name) could have employed others to do the work. If you find that for any foreseeable time in the future (he) (she) will be performing such necessary services, you should also make reasonable allowance for the future services.

COMMENT

This instruction and comment were originally published in 1960. They were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction is applicable to services provided by either spouse. A spouse's claim for nursing services to an injured spouse is derivative. The causal negligence of the injured spouse bars or limits the recovery of the claiming spouse pursuant to the provisions of the comparative negligence statute. White v. Lunder, 66 Wis.2d 563, 225 N.W.2d 442 (1975).

Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972); Moritz v. Allied Mut. Fire Ins. Co., 27 Wis.2d 13, 133 N.W.2d 235 (1965); Verhelst Constr. Co. v. Galles, 204 Wis. 96, 102, 235 N.W. 556, 558 (1931). See also Comment, Wis JI-Civil 1815.

Loss of earning by the treating spouse is not a proper measure of the reasonable value of the nursing services provided to the injured spouse. Redepenning, supra at 137.

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1825 INJURY TO WIFE: MEDICAL AND HOSPITAL EXPENSES

Instruction withdrawn.

COMMENT

This instruction was originally published in 1960. It was withdrawn in 1995.

The doctrine of necessaries has been modified by Wis. Stat. § 765.001(2), part of Wisconsin's Marital Property law. Under this landmark change to the law of property ownership and family support obligations, Wisconsin law now imposes personal liability on each spouse for the other's necessaries. Section 765.001(2) provides:

> Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.

The court of appeals has interpreted this new provision as providing that a spouse is equally responsible for medical expenses incurred by the other spouse while the two are married. St. Mary's Hosp. Med. Center v. Brody, 186 Wis.2d 100, 519 N.W.2d 706 (Ct. App. 1994).

As a result of this change in the doctrine of necessaries, the Committee withdrew this instruction which was based on the husband having primary responsibility for his wife's medical bills. Recovery of medical and hospital expenses by a plaintiff is covered in Wis JI-Civil 1750A, 1754, and 1765.

Under the prior common-law doctrine, the husband had the duty to support himself, his wife, and others in the family. The wife, however, had no duty to support and was not liable to a creditor for necessaries furnished to her or her husband. In applying this former doctrine, Wisconsin courts have held that a married woman was not liable for medical services furnished her (unless covered by an express contract) and, therefore, was not entitled to recover the value of the medical service from a tortfeasor. Instead, recovery of such expenses for medical services to the wife was for the husband. Luther Hosp. v. Garborg, 71 Wis.2d 460, 462, 238 N.W.2d 529 (1976); Seitz v. Seitz, 35 Wis.2d 282, 295, 151 N.W.2d 86 (1967); Fischer v. Fischer, 31 Wis.2d 293, 309, 142 N.W.2d 857 (1966); Fee v. Heritage Mut. Ins. Co., 17 Wis.2d 364, 117 N.W.2d 268 (1962); Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 343, 349, 99 N.W.2d 163 (1959); Jewell v. Schmidt, 1 Wis.2d 241, 83 N.W.2d 487, 491092 (1957). Only if the injured wife obligated herself by contract to pay for medical care could the wife recover for the cost of such care. Seitz v. Seitz, 35 Wis.2d 282, 151 N.W.2d 86 (1967); Sulkowski v. Schaefer, 31 Wis.2d 600,143 N.W.2d 512 (1966). In Jewell, supra at 250, the court expressed the prevailing necessaries doctrine in the following manner:

> The early rule was that it was the husband's absolute duty to pay for medical services to his wife,a nd that this duty could not be altered even where the wife agreed to pay the bills, recognized them as her personal debt, and in fact made payments on them from time to time from her separate estate. Stack v. Padden (1901), 111 Wis. 42, 86 N.W. 568.

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This absolute bar has been softened by subsequent decisions, based on the statutes extending the legal rights of married women. The present rule is that a married woman may contract for medical services in her own right but, in the absence of the establishment of such an express contract between the wife and the person rendering the service, the husband, and not the wife, is the person liable for such expenses and the one entitled to recover for them.

In Estate of Stromstead, 99 Wis.2d 136, 299 N.W.2d 226 (1980), the hospital which had rendered medical services to the wife sued the wife's estate for the value of such services. The estate argued that, based on the prevailing common law doctrine of necessaries, a married woman is not liable under implied contract principles for such medical services. On review, the supreme court said that a wife shares with her husband a limited legal duty of support of the family and that the wife may be held liable to an implied-in-law contractual obligation for the provision of medical services and other necessaries to her or family. Specifically, the court said a married woman "cannot be viewed as being immune from such a suit" as suggested in Jewell v. Schmidt, supra. The earlier line of cases cited above were overruled. However, the court in reshaping the necessaries doctrine refused to impose joint and several liability on the husband and wife. Instead, the court held that a creditor seeking to recover under the rule of necessaries for goods or services furnished to the wife or family members must first proceed against the husband as the primary responsible party. Stromstead, supra at 144. To the extent the husband is unable to satisfy his obligation in this regard, the creditor may seek satisfaction from the wife.

The reshaping of the necessaries doctrine in Stromstead was later reaffirmed by the court in Marshfield Clinic v. Discher, 105 Wis.2d 506, 314 N.W.2d 326 (1982).

In Marshfield Clinic, the court considered whether, under its Stromstead rule, a wife can be held liable for the necessary medical expenses incurred by her husband in the absence of her agreement to accept responsibility for the expenses. The court reaffirmed the doctrine it had developed in Stromstead which made the wife secondarily liable for the payment of necessaries furnished to family member. The court held that its rule was constitutional even though the classification incorporated in the rule was gender based because the rule served several important governmental objectives. Marshfield Clinic, supra at 509-17. The court also stated that the Stromstead rule only applies in the absence of an express agreement by the parties. Thus, if the medical provider had expressly agreed to look only to the husband for payment of his or his family's medical expenses, then the wife could not be liable.

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1830 INJURY TO WIFE: MEDICAL AND HOSPITAL BILLS: DISPUTE OVER OWNERSHIP OF CLAIM

Instruction withdrawn.

COMMENT

This instruction was originally published in 1966.

See Comment to Wis JI-Civil 1825.

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1835 INJURY TO MINOR CHILD: PARENT'S DAMAGES FOR LOSS OF CHILD'S EARNINGS AND SERVICES: PAST AND FUTURE

Question _____ asks you to determine [(parent)s'] [(parent)'s] loss of (child)'s services resulting from the injuries sustained by (child). The (parents) (parent) of an injured minor child (are) (is) entitled to the earnings and to the reasonable value of the services which the minor child was capable of rendering to the (parents) (parent) until the child reaches the age of 18.

You should award such sum as will reasonably compensate (parents) (parent) for any loss of income as you are satisfied (minor child) was reasonably capable of earning and for the loss of the reasonable value of the services to which (parents) (parent) were entitled during the period of (minor child)'s disability, to date, resulting from injuries received in (the accident).

If you find that (minor child)'s disability will continue in the future as a natural result of the injuries sustained in (this accident), you should allow (parents) (parent), and include in your award, an amount which will fairly and reasonably compensate (them) (him) (her) for any loss of income (minor child) would have been reasonably capable of earning and for the reasonable value of the services which (minor child) would have rendered to (parents) (parent), except for the disability, until (minor child)'s 18th birthday.

While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of (loss of future earning capacity) requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

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COMMENT

The instruction and comment were initially approved by the Committee in 1979 and revised in 2000.

Webster v. Krembs, 230 Wis. 252, 260-61, 282 N.W. 564 (1939); Osborne v. Montgomery, 203 Wis. 223, 227, 234 N.W. 372 (1931); Callies v. Reliance Laundry Co., 188 Wis. 376, 380, 206 N.W. 198 (1925); Johnson v. St. Paul & Western Coal Co., 131 Wis. 627, 632, 111 N.W. 722 (1907).

In each of the instructions 1835 through 1845 is included a paragraph on future damages. These paragraphs would be employed only where called for by the fact situation.

Evidence of Future Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1837 INJURY TO MINOR CHILD: PARENT'S LOSS OF SOCIETY AND COMPANIONSHIP

Question _____ asks you to determine (the parent)'s loss of society and companionship resulting from injuries sustained by (child).

Society and companionship includes the love, affection, care, and protection the parent would have received from (his) (her) child had the child not been injured. It does not include the loss of monetary support from the child or the grief or mental suffering caused by the child's injury.

In determining (parent)'s loss of society and companionship, you should consider the age of the (child) and the age of the parent; the past relationship between the child and the parent; the love, affection, and conduct of each toward the other; the society and companionship that had been given to the parent by the child; and the personality, disposition, and character of the child and the parent. The amount inserted by you should reasonably compensate the parent for any loss of society and companionship (he) (she) has sustained since the injury to (his) (her) child and the amount you are reasonably certain (he) (she) will sustain in the future.

If you find that (minor child)'s disability (injuries) will continue in the future as a natural result of the injury and that (parent) will sustain a loss of the child's society and companionship in the future, you should include in your award the sum that will fairly and reasonably compensate (parent) for this future loss but only until the injured child reaches (his) (her) 18th birthday.

COMMENT

The instruction and comment were initially approved by the Committee in 1979 and revised in 1984, 1988, and 2000. The comment was updated in 2000.

This instruction was originally written to cover a claim by both parents for loss of society and companionship of their child. The instruction has been revised and is based on a special verdict in which a separate inquiry for each parent is submitted to the jury. To avoid any potential problem with motions after verdict, the Committee believes the

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better procedure is to submit separate verdict questions for each parent. Although in some cases, the parents will agree to a single question.

See Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 361 N.W.2d 297 (Ct. App. 1984).

Two causes of action arise for an injury to a child: the child's for his or her own injury and the parents for the invasion of the parents' interest. Korth v. American Family Ins. Co., 115 Wis.2d 326, 330, 340 N.W.2d 494 (1983).

Parents may maintain an action against a negligent tortfeasor for medical expenses and loss of society and companionship of the injured child. Korth v. American Family Ins. Co., supra; Shockley v. Prier, 66 Wis.2d 394, 225 N.W.2d 495 (1975). The parents' claim for loss of society and companionship must be combined with that of the child for personal injuries. Shockley v. Prier, supra at 404. In Korth, supra, the court stated that although Shockley v. Prier, supra, did not require the joinder of the parents' claim for medical expenses with the child's claim, as a practical matter the parents' claim for medical expenses should be joined with the parents' claim for loss of society and companionship. Korth v. American Family Ins. Co., supra at 331.

In Korth, supra, the court held that where the parents' claim for damages for loss of society and companionship and medical expenses was filed along with the minor child's within the statutory time period for filing the minor's claim, the parents' claim was timely filed.

Shockley v. Prier, supra, leaves undecided whether parents have a claim for damages after the child attains his or her majority.

The parents' claim is derivative but must be proved separately from the underlying claim of the child. Thus, distinct damages must be shown and any negligence of the parents in causing the child's injuries may reduce or defeat recovery through operation of the comparative negligence statute. Geise v. Montgomery Ward, Inc., 111 Wis.2d 392, 400, 405, 331 N.W.2d 585 (1983).

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1838 INJURY TO PARENT: MINOR CHILD'S LOSS OF SOCIETY AND COMPANIONSHIP

Question _____ asks you to determine (child)'s loss of society and companionship resulting from injuries sustained by (parent).

Society and companionship includes the love, affection, care, protection, and guidance the child would have received from (parent) had (he) (she) not been injured. It does not include the loss of monetary support from the parent or the grief or mental suffering caused by the parent's injury.

In determining (child)'s loss of society and companionship, you should consider the age of the child and the age of parent; the past relationship between the child and the parent; the love, affection, and conduct of each toward the other; the society and companionship that had been given to the child by the parent; and the personality, disposition, and character of the child and parent. The amount inserted by you should reasonably compensate (child) for any loss of society and companionship (child) has sustained since the injury to (parent) and the amount you are reasonably certain (he) (she) will sustain in the future.

If you find that (parent)'s disability (injuries) will continue in the future as a natural result of the injury and that (child) will suffer a loss of the (parent)'s aid, comfort, society, and companionship in the future, you should include in your award such sum as will fairly and reasonably compensate (child) for this future loss but only until (child) reaches (his) (her) 18th birthday.

COMMENT

The instruction and comment were approved in 1989 and revised in 2000.

In Theama v. City of Kenosha, 117 Wis.2d 508, 344 N.W.2d 513 (1984), the court held that a minor child may recover for the loss of care, society, companionship, protection, training, and guidance of an injured parent. See also Bell v. County of Milwaukee, 134 Wis.2d 25, 396 N.W.2d 328 (1986). See Wis JI-Civil 1837.

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A child's claim will be barred or the amount permitted as recovery reduced by any defenses against the injured parent, such as contributory negligence. Recovery by a child is limited to the child's minority. Theama, supra at 527.

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1840 INJURY TO MINOR CHILD: PARENTS' DAMAGES FOR MEDICAL EXPENSES: PAST AND FUTURE

Subdivision ____ of question ___ asks what sums will reasonably compensate (plaintiff) for hospital, medical, and dental expenses incurred for the care and treatment of (his) (her) minor (son) (daughter).

Under the law, parents are liable for the reasonable expenses necessarily incurred in the care and treatment of their minor children.

You will carefully consider the credible evidence, and reasonable inferences therefrom, bearing on this inquiry and in answer name such sum as will fairly and reasonably compensate (plaintiff) for such hospital, medical, and dental expenses as (he) (she) necessarily incurred for the care of (minor child) in the treatment of the injuries sustained by (minor child) as a natural and direct result of this (collision) (accident). If you find that such expenses will continue to be incurred in the future by (plaintiff), you should allow, and include in your award, an amount which will fairly and reasonably compensate (plaintiff) for such medical, hospital, and dental expenses as (plaintiff) will necessarily incur for the care of (minor child) in the treatment of the injuries sustained by (him) (her) as a natural result of the (collision) (accident), during the period of (his) (her) minority, up to but not beyond the time (he) (she) will have reached (his) (her) 18th birthday.

COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1980 and reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. An editorial correction was made in 1996.

Sulkowski v. Schaefer, 31 Wis.2d 600, 608, 143 N.W.2d 512 (1966); Knutson v. Fenelon, 200 Wis. 261, 265, 227 N.W. 857, 858 (1929); West v. Day, 193 Wis. 187, 195, 212 N.W. 648, 651 (1927); Grimes v.

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Snell, 174 Wis. 557, 560, 183 N.W. 895, 896 (1921); Kruck v. Wilbur Lumber Co., 148 Wis. 76, 83, 133 N.W. 1117, 1120 (1912); Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis.2d 231, 201 N.W.2d 745 (1972).

In each of the instructions 1835 through 1845 is included a paragraph on future damages. These paragraphs would be employed only where called for by the fact situation.

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1845 INJURY TO CHILD: PARENTS' DAMAGES FOR SERVICES RENDERED TO CHILD: PAST AND FUTURE

Subdivision __ of question __ asks what sum will reasonably compensate (name) for additional home and personal nursing care and services rendered to (his) (her) minor (son) (daughter) because of the injuries sustained in this (collision) (accident).

You will carefully consider the credible evidence, and reasonable inferences therefrom, bearing on this inquiry and in answer name such sum as will fairly and reasonably compensate (_____) for such additional home and nursing care and services as the parents necessarily furnished and rendered to their minor (son) (daughter) in the care and treatment of the injuries sustained by (him) (her) as a natural result of this (collision) (accident).

The amount you will allow for such services, however, will not exceed an amount (_____) would have been compelled to pay others to render such or similar services.

If you find that such nursing care and services will continue to be incurred in the future, you may allow, and include in your award, an amount which will fairly and reasonably compensate (_____) for such home nursing care and services as the parents will necessarily render and furnish to their minor (son) (daughter) in the care and treatment of the injuries sustained by (him) (her) as a natural result of this (collision) (accident), during the period of (his) (her) minority, up to but not beyond the time (he) (she) will have reached (his) (her) 18th birthday. Such sum shall not exceed the amount (_____) would be compelled to pay others to render such or similar services.

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COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Sulkowski v. Schaefer, 31 Wis.2d 600, 608, 143 N.W.2d 512 (1966); Johnson v. St. Paul & Western Coal Co., 131 Wis.2d 627, 630-31, 111 N.W.2d 722, 723 (1907). See also Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 361 N.W.2d 297 (Ct. App. 1984).

In each of the instructions 1835 through 1845 is included a paragraph on future damages. These paragraphs would be employed only where called for by the fact situation.

Parents may also recover damages for loss of aid, comfort, society, and companionship of a minor child who has been injured by the negligence of a third person. Shockley v. Prier, 66 Wis.2d 394, 225 N.W.2d 495 (1975); Comment, "Children: Chattels to Chums — Shockley v. Prier," 59 Marq. L. Rev. 169 (1976).

See also Wis JI-Civil 1835 and 1837.

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1850 ESTATE'S RECOVERY FOR MEDICAL, HOSPITAL, AND FUNERAL EXPENSES

NO INSTRUCTION.

SPECIAL VERDICT

Subdivisions ___ and ___ of question ___ ask what sum of money will fairly and reasonably compensate the estate of (name) for the medical and hospital expenses necessarily and reasonably incurred in the care of the deceased at the time of (name)'s death because of the injuries received in the accident and also such further sum as will fairly and reasonably compensate the estate of (name) for the funeral and burial expenses of (name).

COMMENT

This verdict question and comment were originally published in 1960. They were revised in 1983. The comment was revised in 2005. The "Special Verdict" heading was added in 2016.

Medical and funeral expenses are recoverable by the personal representative of the decedent's estate or relatives of the decedent. Wis. Stat. § 895.04(5); Wangen v. Ford Motor Co., 97 Wis.2d 260, 312, 294 N.W.2d 437 (1980).

For medical expenses and funeral expense in a medical negligence case, see Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 2005 WI 124, 700 N.W.2d 201. In Lagerstrom, the court discussed collateral source payments and subrogation (reimbursement) rights. See also Wis JI-Civil 1757.

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1855 ESTATE'S RECOVERY FOR PAIN AND SUFFERING

The law provides that the estate of a deceased person is entitled to be compensated fairly and reasonably for pain and suffering endured by (name) from the time of the accident up to the time of death.

Pain and suffering includes all physical pain and discomfort, worry and mental distress. In determining the amount of damages for pain and suffering, you will consider the nature, extent, and duration of all physical pain and suffering, mental anguish, apprehension, discomfort or sorrow the deceased consciously endured and suffered between the time of the accident and death and insert as your answer such sum as will, in your judgment, represent reasonable compensation for such pain and suffering as you are reasonably certain (name) endured and suffered as a natural result of injuries received in the accident.

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The comment was updated in 2018.

Schultz v. General Casualty Co., 233 Wis. 118, 128 N.W. 803, 808 (1939); Prange v. Rognstad, 205 Wis. 62, 65-67, 236 N.W. 650, 652 (1931); Koehler v. Waukesha Milk Co., 190 Wis. 52, 56, 208 N.W. 901, 902-03 (1926); Tidmarsh v. Chicago M. & St. P. Ry., 149 Wis. 590, 598-99, 136 N.W. 337, 341 (1912).

In Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797, the court of appeals concluded that credible evidence relating to pre-death pain and suffering distinguished the case from Bowen v. Lumbermens Mut. Casualty Co., 183 Wis.2d 627, 517 N.W.2d 432 (1994), and affirmed the trial court's holding that damages were properly awarded for pre-death pain and suffering.

For negligent infliction of emotional distress, see Wis JI-Civil 1510 and 1511.

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1860 DEATH OF HUSBAND: PECUNIARY LOSS

This instruction was withdrawn in 1992 and replaced with JI-Civil 1861.

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1861 DEATH OF SPOUSE (DOMESTIC PARTNER): PECUNIARY LOSS

(Plaintiff), as the surviving (spouse) (domestic partner) of (deceased), is entitled to be compensated for any financial loss (he) (she) sustained as a result of (his) (her) (spouse's) (domestic partner's) death.

In answering question _____, consider: (deceased)'s age, the age of (surviving spouse) (domestic partner), (deceased)'s condition of health prior to the accident, (deceased)'s earning capacity, and (his) (her) reasonable prospects for earning at the time of (his) (her) death. Your answer should be a sum, if any that equals the value of the support and protection (he) (she) would have furnished to (surviving spouse) (domestic partner) during the time (he) (she) probably would have lived. In determining this sum, consider the number and ages of (deceased)'s children, the assistance and services (he) (she) would have rendered to (surviving spouse) (domestic partner) had (he) (she) lived in keeping, maintaining, and supervising the home and in the caring for (his) (her) children.

[If (deceased) rendered gratuitous services to (surviving spouse) (domestic partner) in (spouse's) (domestic partner's) business for which (spouse) (domestic partner) would have to employ others to do the work (deceased) performed and, if you are reasonably certain that the services would have continued in the future had (deceased) lived, then you may consider the reasonable value of the future services and make allowance for them.]

[You should also consider any accumulations of property that would have resulted from the earnings of (deceased) during the time (he) (she) would probably have lived, and the reasonable expectation, if any, which (surviving spouse) (domestic partner) had of ultimately receiving the accumulations.]

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Do not include any amount for pain and suffering of (deceased) prior to death, for burial expenses, for the loss of society and companionship of (deceased), or for the grief or anguish suffered by (surviving spouse) (domestic partner) because of (deceased)'s death. [These items are covered by other questions in the verdict.]

[While (spouse) (domestic partner) has the burden of establishing pecuniary loss, the evidence relating to this type of damage need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You are not required in determining pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which reasonably supports your determination of damages.]

COMMENT

This instruction and comment were approved in 1991 and revised in 2000 and 2009. The instruction replaced Wis JI-Civil 1860 and 1865.

Wis. Stat. § 895.04(4).

See Wis JI-Civil 1796 for the present value of future losses.

Wis. Stat. § 895.04(2) denominates plaintiffs in wrongful death actions. If a deceased leaves a surviving spouse or domestic partner under Chapter 770, the spouse or domestic partner is the owner of the wrongful death action. Cogger v. Trudell, 35 Wis. 2d 350, 151 N.W.2d 146 (1967), held that the amendment to § 895.04(2) did not affect a change so far as priority of ownership of the cause of action was concerned. If a spouse or domestic partner survives, that person is the owner of the wrongful death cause of action and the children are not. A surviving domestic partner under Chapter 770 was given a claim in 2009 for wrongful death.

The Cogger case has been cited with approval in Hanson v. Valdivia, 51 Wis. 2d 466, 187 N.W.2d 151 (1971), and Steinbarth v. Johannes, 138 Wis. 2d 182, 405 N.W.2d 720 (1987).

Pecuniary Loss. In wrongful death cases, a jury is permitted to consider many elements in determining pecuniary loss, not just actual earnings. Ewen v. Chicago & N.W. Ry. Co., 38 Wis. 613, 624

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(1875); Estate of Holt v. State Farm, 151 Wis. 2d 455, 460, 444 N.W. 2d 453 (Ct. App. 1989). In Estate of Holt, the court of appeals said "pecuniary injury" should be broadly construed. The court concluded that "pecuniary injury," in the wrongful death statute, means "a loss of any benefit which the beneficiary would have received from the decedent if the decedent had lived."

In Maloney v. Wisconsin Power, L. & H. Co., 180 Wis. 546, 193 N.W. 382 (1923), the supreme court approved the trial court's instruction which advised the jury that it was to consider the age of the deceased and the surviving wife, the condition of health of the deceased and his earning capacity, his reasonable prospects at the time of his death, the accumulations of property which would have resulted from his earnings during the time he probably would have lived and the reasonable expectation which his wife had of ultimately receiving such accumulations of property. The court went on to say that the jury could allow such sum as would equal the present value of such support and protection of the wife.

In Herro v. Northwestern Malleable Iron Co., 181 Wis. 198, 201, 194 N.W. 383 (1923), the court held that a surviving spouse was entitled to be compensated for the loss of services performed by the decedent in and about the business of such spouse which would continue after death.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972).

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

Surviving Domestic Partner. As part of the State Budget Bill, a domestic partnership was recognized.

The Budget Bill's provisions extended certain legal rights to domestic partners, including the right to recover damages for wrongful death of a deceased partner. Wis. Stat. 895.04(2) was amended as follows:

> **SECTION 3269**. 895.04(2) and (6) of the statutes are amended to read:
> 895.04**(2)** If the deceased leaves surviving a spouse **or domestic partner under ch. 770, and domestic partner under s. 770.05,** and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse **or surviving domestic partner,** and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse **or**

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> **domestic partner** of the deceased; if no spouse **or domestic partner** survives, to the deceased's lineal heirs as determined by s. 852.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien spouse **or a nonresident alien domestic partner under ch. 770** and minor children shall be entitled to the benefits of this section. In cases subject to s. 102.29 this subsection shall apply only to the surviving spouse's **or surviving domestic partner's** interest in the amount recovered. If the amount allocated to any child under this subsection is less than $10,000, s. 807.10 may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

The legislation added "a surviving domestic partner" to § 895.04(6), but the legislation did not add "a surviving domestic partner" to § 895.04(4) which reads:

> **(4)** Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the **spouse, children or parents of the deceased, or to the siblings** of the deceased, if the siblings were minors at the time of the death. (Emphasis added)

Thus, while a domestic partner may recover for "pecuniary injury" from wrongful death, he or she does not apparently have the right to recover for loss of society and companionship under the second sentence. The committee revised Wis JI-Civil 1861 (pecuniary loss) to include a domestic partner, but did not revise Wis JI-Civil 1870 (loss of society and companionship), other than mentioning in that instruction's commentary the problematic statutory language as to the recovery of loss of society and companionship damages by a domestic partner.

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1865 DEATH OF WIFE: PECUNIARY LOSS

This instruction was withdrawn in 1992 and replaced with JI-Civil 1861.

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1870 DEATH OF SPOUSE: SURVIVING SPOUSE'S LOSS OF SOCIETY AND COMPANIONSHIP

Question ___ asks you to determine (spouse)'s loss of society and companionship resulting from the death of (deceased spouse).

Society and companionship includes the love, affection, care, and protection (spouse) would have received from (deceased spouse) had (he) (she) continued to live. It does not include the loss of monetary support or the grief and mental suffering caused by the spouse's death.

In determining (spouse)s' loss of society and companionship, you should consider the age of (deceased spouse) and the age of (surviving spouse); the past relationship between the spouses; the love, affection, and conduct of each toward the other; the society and companionship that had been given to (surviving spouse) by (deceased spouse); and the personality, disposition, and character of (deceased spouse). The amount inserted by you should reasonably compensate spouse for any loss of society and companionship (she) (he) has sustained since the death of (deceased spouse) and the amount you are reasonably certain (she) (he) will sustain in the future.

Although the law provides that a party cannot recover more than ($350,000) ($500,000) for the loss of a spouse's society and companionship, this dollar limit is not a measure of damage; it is a limit on recovery. Therefore, you should determine the amount that you believe will reasonably compensate (spouse) for any loss of society and companionship.

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COMMENT

The instruction and comment were initially approved by the Committee in 1979. The instruction was revised in 1981, 1988, 1992, 1999, and 2000 to reflect legislative amendments increasing the maximum recovery and to make the instructions on loss of society and companionship consistent. The comment was updated in 1990, 1991, 1992, 1999, 2004, 2005, 2010, 2011, 2015, 2018 and 2019.

This instruction was cited by the court in Koltka v. PPG Industries, Inc., 130 Wis.2d 499, 519, 338 N.W.2d 160 (1986).

Loss of society and companionship does not create a new cause of action but only another element of damages. Herro v. Steidl, 255 Wis. 65, 37 N.W.2d 874 (1949); Cronin v. Cronin, 244 Wis. 372, 12 N.W.2d 677 (1944); Papke v. American Auto Ins. Co., 248 Wis. 347, 21 N.W.2d 724 (1946). For eligibility of claimants for this element of damages, see Cincoski v. Rogers, 4 Wis.2d 423, 90 N.W.2d 784 (1958).

The last paragraph of the instruction is mandated by Peot v. Ferraro, 83 Wis.2d 727, 266 N.W.2d 586 (1978).

Statute. See Wis. Stat. § 895.03 and 895.04.

Damage Caps. The maximum recovery was increased in 1998 to $350,000 in the case of a deceased adult and $500,000 for a deceased minor. Wis. Stat. § 895.04(4).

Wrongful Deaths Outside of Wisconsin. In 2014, the Wisconsin Supreme Court considered a case involving a fatal snowmobile accident in Michigan, killing a Wisconsin resident. The surviving spouse brought a wrongful death action in Wisconsin. The circuit court determined that the wrongful death damage limitations in § 895.04 applied to the spouse's claim. The court of appeals disagreed. The Wisconsin Supreme Court affirmed. It said that the limitations on wrongful death claims in § 895.04 refer to wrongful death claims created by Wis. Stat. § 895.03. It ruled that § 895.04 cannot be applied separately from Wis. Stat. § 895.03. The court further held that because § 895.03 does not apply to deaths in another state, there is no conflict between Wisconsin law and Michigan's wrongful death statute and Michigan's limitation, higher than Wisconsin's damage limit, applies. See Waranka v. State Farm Mut. Auto Ins. Co., 2014 WI 28, 353 Wis.2d 619, 847 N.W.2d 324.

Negligence of Long-Term Care Provider. Wis. Stat. § 893.555(6), limits the recovery for loss of society and companionship in a wrongful death of a spouse in cases involving the negligence of a long-term care provider to the amount set forth in Wis. Stat. § 895.04(4) (2011 Wisconsin Act 2).

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - - not in addition to - -

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the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Surviving Domestic Partners. Currently, there are two instructions covering a surviving spouse's claim for wrongful death. Wis JI-Civil 1861 instructs on recovery of pecuniary loss and Wis JI-Civil 1870 applies to recovery of damages for loss of society and companionship.

As part of the State Budget Bill, a domestic partnership was recognized. The Budget Bill's provisions extended certain legal rights to domestic partners, including the right to recover damages for wrongful death of a deceased partner. Wis. Stat. 895.04(2) was amended as follows:

> **SECTION 3269**. 895.04(2) and (6) of the statutes are amended to read:
> 895.04**(2)** If the deceased leaves surviving a spouse **or domestic partner under ch. 770, and domestic partner under s. 770.05,** and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse **or surviving domestic partner,** and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse **or domestic partner** of the deceased; if no spouse **or domestic partner** survives, to the deceased's lineal heirs as determined by s. 852.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien spouse **or a nonresident alien domestic partner under ch. 770** and minor children shall be entitled to the benefits of this section. In cases subject to s. 102.29 this subsection shall apply only to the surviving spouse's **or surviving domestic partner's** interest in the amount recovered. If the amount allocated to any child under this subsection is less than $10,000, s. 807.10 may be applied. Every settlement in wrongful death cases

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> in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

The legislation added "a surviving domestic partner" to § 895.04(6), but the legislation did not add "a surviving domestic partner" to § 895.04(4) which reads:

> **(4)** Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the **spouse, children or parents of the deceased, or to the siblings** of the deceased, if the siblings were minors at the time of the death. (Emphasis added)

Thus, while a domestic partner may recover for "pecuniary injury" from wrongful death, he or she does not apparently have the right to recover for loss of society and companionship under the second sentence. The committee revised Wis JI-Civil 1861 (pecuniary loss) to include domestic partner, but did not revise Wis JI-Civil 1870 (loss of society and companionship), to include a domestic partner.

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1875 DEATH OF SPOUSE: MEDICAL, HOSPITAL, AND FUNERAL EXPENSES

Subdivision _____ of question _____ asks what sum of money will fairly and reasonably compensate (plaintiff) for the medical and hospital expenses (plaintiff) necessarily incurred in the care and treatment of (his wife) (her husband) for the injuries sustained as a result of this accident and for the reasonable and necessary expenses incurred for (her) (his) burial.

COMMENT

This instruction and comment were originally published in 1966. They were revised in 1983. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Wis. Stat. § 895.04(5).

The instruction is applicable to both spouses.

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1880 DEATH OF PARENT: PECUNIARY LOSS

Subdivision __ of question __ asks what sum of money would fairly compensate the children of (name of deceased) for the pecuniary loss suffered by them as a result of the death of their (father) (mother).

In answering this subdivision of question __, you will insert as your answer such sum of money representing the pecuniary loss, if any, as you may find has been sustained by the plaintiff children by reason of the (father)'s (mother)'s death resulting from the injuries received in the accident.

The term "pecuniary loss" means the same as financial loss, and in answering this question and assessing damages to the plaintiff children, you are to restrict it to that meaning. You are not to include anything in your answer to the subdivision of question __ on account of any grief or injury to feelings or like suffering on the part of the plaintiff children, nor should the fact that the (father)'s (mother)'s death may have hastened the period when the children came into possession of the (father)'s (mother)'s estate be considered by you in arriving at your answer to this subdivision.

In arriving at your answer to this subdivision, you will consider the number of years the (father) (mother) would probably have lived had it not been for the injury sustained as a result of the accident; the reasonable expectation of the amount of (his) (her) estate and property being increased, and the reasonable expectation which the plaintiff children had of pecuniary advantage by ultimately receiving a share of such earnings as one of (his) (her) next of kin; the reasonable expectation of pecuniary benefit to the children, or any of them, by way of support, or otherwise, had the deceased continued to live without such injury.

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[In considering the pecuniary loss, if any, sustained by a minor child or children upon the death of a parent, you may consider the care and nurture and the intellectual, moral, and physical training which the parent would have given the child or children except for such parent's death, such as when obtained from others, must be for financial compensation.]

You may properly consider the state of health of the (father) (mother) at and before the time of (his) (her) death, (his) (her) habits of industry, and (his) (her) ability to work and save and accumulate property.

[While the plaintiff has the burden of establishing pecuniary loss, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.]

COMMENT

The instruction and comment were originally published in 1965 and revised in 2000. The comment was also updated in 1980, 1982, 1990, and 2016.

In 1975, Wis. Stat. § 895.04(4) was amended to broaden the right to recover pecuniary losses in wrongful death actions. Prior to this amendment, the right to pecuniary recovery for wrongful death was restricted to the spouse, the unemancipated or dependent children, or the parents of the deceased. Harris v. Kelley, 70 Wis.2d 242, 255, 234 N.W.2d 628 (1975); Rabe v. Outagamie County, 72 Wis.2d 492, 502, 241 N.W.2d 428 (1976). As explained in Rabe, the effect of the amendment is to permit awards of pecuniary losses to any person entitled to bring an action for wrongful death. The amendment, thus, allows such persons as nondependent and emancipated children as well as other relatives of the deceased to also recover pecuniary losses. For example, in Rabe, the court stated that, based on the legislative change, the sister of the deceased was allowed to seek recovery for pecuniary losses. Although the amendment broadened the

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right to pecuniary recovery, Wis. Stat. § 895.04(4) still restricts recovery for loss of society and companionship to the spouse, unemancipated or dependent children, or parents of the deceased.

If the plaintiff is an adult, the second from the last paragraph of the instruction should be deleted.

This instruction was cited with approval in Boles v. Milwaukee County, 150 Wis.2d 801, 817, 443 N.W.2d 679 (Ct. App. 1989).

In regard to hastening the child's possession of the parent's estate, see Kaesler, Adm'r v. Milwaukee Elec. Ry. & Light Co., 195 Wis. 108, 113, 217 N.W. 687, 689 (1928); Stahler v. Philadelphia & R.R., 199 Pa. 383, 386, 49 Atl. 273, 274 (1901); 5 Sutherland, Damages § 1267 (4th ed. 1916).

In support of the fourth paragraph of the instruction, see Tuteur, Adm'r v. Chicago & N. W. Ry., 77 Wis. 505, 507-08, 46 N.W. 897, 898 (1880).

As to present worth of future payments and finding proper discount rate, see Miller v. Tainter, 252 Wis. 266, 31 N.W.2d 531 (1948). See also Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 552, 361 N.W.2d 297 (Ct. App. 1984).

A posthumous illegitimate child may not maintain an action for the death of his putative father under wrongful death statutes where the paternity has not been established either by admissions in writing or in court or in accordance with Wis. Stat. § 852.05(1). Robinson v. Kolstad, 84 Wis.2d 579, 267 N.W.2d 886 (1976).

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972).

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

Collateral Source Payments. See commentary to Wis JI-Civil 1757.

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1885 DEATH OF ADULT CHILD: PECUNIARY LOSS

In answering subdivision ___ of question ___, you will insert as your answer the sum of money representing the pecuniary loss, if any, you find has been sustained by the parents, _____ ____, as a result of the death of their adult (son) (daughter) from injuries received in the accident.

By the term "pecuniary loss" is meant financial loss. In answering this subdivision, you must restrict your answer to a fair and reasonable compensation for any such loss. You must not consider or include anything on account of grief or other mental suffering of _____, the parents of _____.

The deceased (son) (daughter) in this case was over 18 years of age at the time of (his) (her) death and under the law a parent may not claim the services of such an adult child as a matter of right. When a child attains 18 years of age, (he) (she) is entitled to retain all of the money earned as the result of (his) (her) services and (he) (she) is not required to turn over the money to (his) (her) parents upon demand of the parents.

In arriving at your answer to this subdivision, you should consider the amount of money and the pecuniary value of services, if any, the deceased child contributed to (his) (her) parents after (he) (she) became of age and before (his) (her) death; [that (he) (she) was single at the time this money was contributed, and the likelihood of continued contributions in the event of (his) (her) marriage and acquiring a family of (his) (her) own;] the length of time the parents may reasonably expect financial aid from (him) (her). If you are satisfied that by reason of the age and physical health of the parents their life expectancy is limited to such a degree that they could not reasonably expect financial assistance for many years, you will make allowances for that fact.

While the plaintiff has the burden of establishing pecuniary loss, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items

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of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

The instruction and comment were originally published in 1960 and revised in 2000. The comment was updated in 1980 and 2000.

Bump v. Voights, 212 Wis. 256, 261-62, 249 N.W. 508, 510 (1933); Prange v. Rognstad, 205 Wis. 62, 65-67, 236 N.W. 650, 650-52 (1931).

The fifth paragraph of this instruction was approved in Sandeen v. Willow River Power Co., 214 Wis. 166, 185, 252 N.W. 706, 713 (1934).

In Wisconsin, separate rules govern the recovery of premajority and postmajority pecuniary loss to a parent. Peot v. Ferraro, 83 Wis.2d 727, 733, 266 N.W.2d 586 (1978); Keithley v. Keithley, 95 Wis.2d 136, 279 N.W.2d 503 (1980).

There is no presumption in favor of parents receiving pecuniary benefits from their children after the children reach majority. Nordahl v. Peterson, 68 Wis.2d 538, 553, 229 N.W.2d 682 (1975). There must be some evidence justifying an inference that the parents would have received pecuniary benefits after the attainment of the child's majority if the death had not occurred. Peot v. Ferraro, supra at 734.

Wis JI-Civil 1890, Death of Minor Child: Premajority Pecuniary Loss, also includes a portion relating to postmajority pecuniary injury. See Peot, supra at 736.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). "Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts (citations)." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973).

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1890 DAMAGES: DEATH OF MINOR CHILD: PREMAJORITY PECUNIARY LOSS

(Plaintiffs), as parents of (child), claim loss of wages and services they would have received from (child) during (child)'s minority had (he) (she) continued to live.

Although parents are responsible for the cost of providing for the care and maintenance of their child until the child reaches age 18, they are entitled to the value of the wages and services that their child was reasonably capable of (earning) (providing to the parents) until (he) (she) reached age 18. If you find that the value of these wages or services would have exceeded the costs (parents) would have incurred in raising (child) to age 18, you should insert the difference in answer to question __.

While the plaintiff has the burden of establishing pecuniary loss, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

The instruction and comment were approved in 1978 and revised in 1997 and 2000.

Wis. Stat. § 895.04(4).

Premajority pecuniary loss is measured by the value of the wrongfully killed minor child's probable wages and services to the time of majority less the costs the parents probably would have incurred in raising the child to age 18. Prunty v. Schwantes, 40 Wis.2d 418, 426, 162 N.W.2d 34 (1968). The fact that the parents allowed or would have allowed the child to keep his or her earnings does not prevent the parents having the value of such wages and services considered and included in determining whether the wages and services of the child during his or her minority have a probable value exceeding the probable expenses the parents would have incurred for the reasonable care, maintenance,

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and necessities during the chid's minority. Luessen v. Oshkosh Elec. Light & Power Co., 109 Wis. 94, 85 N.W. 124 (1901); Peot v. Ferraro, 83 Wis.2d 727, 266 N.W.2d 586 (1978).

Peot holds that, with respect to premajority pecuniary loss, the fact that the child would or would not have turned over his wages to the parents or would or would not have performed services is irrelevant. However, if both premajority and postmajority pecuniary loss is claimed arising out of the death of a child, evidence relating to what contributions were made during minority is relevant on the postmajority pecuniary loss claim.

It may be necessary under some circumstances where both premajority and postpecuniary loss is claimed to instruct the jury that they are not to consider in arriving at the answer to the premajority pecuniary loss question whether the deceased child was allowed to keep his or her wages or was not required to contribute his services (since neither event prevents the parents from having the value of the wages and services considered and included in determining whether the wages and services of the child before age 18 would have a probable value exceeding the probable expenses the parents would have incurred to raise the child to age 18), but that such evidence is relevant and can be considered by the jury with respect to the answer to the question concerning postmajority pecuniary loss.

For burden of proof, see Wis JI-Civil 202. Wis JI-Civil 1892 covers damages for postmajority pecuniary loss due to death of child. Wis JI-Civil 1796 covers the computation of the present value of future losses.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). "Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts (citations)." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973).

Pecuniary injury for the wrongful death of a minor cannot be precisely established. See Peot v. Ferraro, supra.

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1892 DAMAGES: DEATH OF MINOR CHILD: POSTMAJORITY PECUNIARY LOSS

(Plaintiffs), as parents of (child), claim loss of pecuniary benefits they would have received from (child) after (child) reached age 18 had (he) (she) continued to live. If you determine that (parents) would have received pecuniary benefits from (child) after (he) (she) reached age 18, you should insert the amount in answer to question __.

(Pecuniary benefits means gifts, assistance, and support that can be valued in money.)

In determining whether (parents) would have received pecuniary benefits, you should consider (parent)s' age, health, employment and earnings, and the degree to which they were dependent upon (child). You should also consider the (child)'s age, health, employment, earnings, amounts contributed in the past, if any, and the relationship between (child) and (parents).

(Give Wis JI-Civil 1796 on computation of present value.)

While the plaintiff has the burden of establishing pecuniary loss, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of pecuniary loss requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the pecuniary loss to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

The instruction and comment were approved in 1979 and revised in 1997 and 2000.

Postmajority pecuniary loss is measured by the value of the benefits which the parents might reasonably have expected to receive from the child after he or she reached his or her majority at age 18. There must be some evidence justifying an inference that the parents would have received pecuniary benefits from the child after he or she reached majority if death had not occurred. McGonegle v. Wisconsin Gas & Elec. Co., 178 Wis. 594, 190 N.W. 471 (1922).

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Wis JI-Civil 1890 covers damages for premajority pecuniary loss; Wis JI-Civil 1796 covers computation of the present value of future losses.

The value of pecuniary loss suffered as the result of wrongful death cannot be ascertained precisely or by mathematical formula; the jurors, on the basis of their common knowledge and judgment, can determine the value from data that is reasonably supported in the evidence. Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). "Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts (citations)." McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973).

Evidence of Loss. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

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1895 DEATH OF CHILD: PARENT'S LOSS OF SOCIETY AND COMPANIONSHIP

Question __ asks you to determine [(the parent)s'] [(parent)'s] loss of society and companionship resulting from the death of (child).

Society and companionship includes the love, affection, care, and protection the (parents) (parent) would have received from (their) (his) (her) child had (he) (she) continued to live. It does not include the loss of monetary support from the child or the grief and mental suffering caused by the child's death.

In determining [(parent)s'] [(parent)'s] loss of society and companionship, you should consider the age of the deceased child and the ages of the (parents) (parent); the past relationship between the child and the (parents) (parent); the love, affection, and conduct of each toward the other; the society and companionship that had been given to the (parents) (parent) by the child; and the personality, disposition, and character of the child. The amount inserted by you should reasonably compensate the (parents) (parent) for any loss of society and companionship (they) (he) (she) (have) (has) sustained since the death of (child) and the amount you are reasonably certain (they) (he) (she) will sustain in the future.

Although the law provides that a party cannot recover more than ($350,000) ($500,000) for the loss of a child's society and companionship, this dollar limit is not a measure of damage; it is a limit on recovery. Therefore, you should determine the amount that you believe will reasonably compensate (parents) (parent) for any loss of society and companionship (they) (he) (she) (have) (has) suffered.

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COMMENT

The instruction was approved in 1978 and revised in 1988, 1997, 1999, and 2000. The comment was updated in 2004, 2005, 2012, 2015, 2018, and 2019.

This instruction is by analogy from Cameron v. Union Auto Ins. Co., 210 Wis. 659, 666-67, 246 N.W. 420, 423 (1933), which involved a husband-wife relationship. In Potter v. Potter, 224 Wis. 251, 259, 272 N.W. 34, 37 (1937), the court's remarks with regard to a husband's loss of society and companionship also give some collateral support to the elements in the instruction.

The fourth paragraph follows the opinion in Peot v. Ferraro, 83 Wis.2d 727, 746, 266 N.W.2d 586 (1978): ". . . recovery is limited . . .; the statutory figure is not a measure of damage, but only a limit above which the jury cannot go. . . ."

Separate Inquiries for Parents' Claims. Where the parents are separated or divorced, it may be advisable to submit separate questions for each parent. Alternatively, the parents can stipulate at the beginning that they will split equally an award of loss of society and companionship.

Damage Cap. Wis. Stat. § 895.04(4). The limit for loss of society and companionship was raised from $150,000 to $350,000 for a deceased adult or $500,000 for a deceased minor by 1997 Wisconsin Act 89. The amendment applies to actions commenced on or after April 28, 1998. If the death of the child occurred before the effective date, the amount should be changed to $150,000.

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - - not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Damage Cap Where Death Occurs in Another State. See Waranka v. State Farm Mut. Auto Ins. Co., 2014 WI 28, 353 Wis.2d 619, 847 N.W.2d 324 and comment to Wis JI-Civil 1870.

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1897 DEATH OF PARENT: CHILD'S LOSS OF SOCIETY AND COMPANIONSHIP

Question ___ asks you to determine (child)'s loss of society and companionship resulting from the death of (parent).

Society and companionship includes the love, affection, care, protection, and guidance a child would have received from (his) (her) parent had (he) (she) continued to live. It does not include the loss of monetary support or the grief and mental suffering caused by the parent's death.

In determining (child)'s loss of society and companionship, you should consider the age of the deceased parent and the age of the child; the past relationship between the child and the parent; the love, affection, and conduct of each toward the other; the society and companionship that had been given to the child by the parent; the personality, disposition, and character of both the child and the parent. The amount inserted by you should reasonably compensate (child) for the loss of society and companionship (he) (she) has sustained since the death of (parent) and the amount (he) (she) will sustain in the future.

If you find that (child) will sustain a loss of the (parent)'s society and companionship in the future, you should include in your award such sum as will fairly and reasonably compensate (child) for the future loss [**Note**: In medical negligence cases, add the following: but only until (child) reaches (his) (her) 18th birthday; see note in Comment].

Although the law provides that a party cannot recover more than ($350,000) ($500,000) for the loss of a parent's society and companionship, this dollar limit is not a measure of damage. It is a limit on recovery. Therefore, you should determine the amount that you believe will reasonably compensate (child) for any loss of society and companionship (he) (she) has sustained.

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COMMENT

This instruction and comment were approved by the Committee in 2000 and revised in 2001. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 2004, 2005, 2009, 2011, 2012, 2015, 2016, 2018 and 2019.

Damage Cap. The limit for loss of society and companionship was raised from $150,000 to $350,000 (for a deceased adult) and $500,000 (for a deceased minor) by 1997 Wisconsin Act 89. The amendment applies to actions commenced on or after April 28, 1998. Wis. Stat. § 893.555(6), limits the recovery for loss of society and companionship in a wrongful death of a parent in cases involving the negligence of a long-term care provider to the amount set forth in Wis. Stat. § 895.04(4) (2011 Wisconsin Act 2). The fifth paragraph follows the opinion in Peot v. Ferraro, 83 Wis.2d 727, 746, 266 N.W.2d 586 (1978): ". . . recovery is limited . . .; the statutory figure is not a measure of damage, but only a limit above which the jury cannot go. . . ." See also Guzman v. St. Francis Hospital, Inc., 2001 WI App 21, 240 Wis.2d 559, 623 N.W.2d 776.

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - - not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Post Majority Recovery. If the parent dies as a result of a cause unrelated to medical negligence, then Wis. Stat. § 895.04 allows recovery of loss of society and companionship by an adult child. See Pierce v. American Family Ins. Co., 2007 WI App 152, 303 Wis.2d 726, 736 N.W.2d 247. Conversely, if the

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cause of death is medical negligence, then a child may recover damages for loss of society and companionship but only until the child reaches his or her 18th birthday. In Czapinski v. St. Francis Hosp., 2000 WI 80, 236 Wis.2d 316, 613 N.W.2d 120, the deceased's adult children sought damages for the loss of their mother's society and companionship following her death during hip replacement surgery. The trial judge held that under Wis. Stat. § 893.55(4)(f), adult children lack standing to recover for the wrongful death of a parent caused by medical malpractice. The supreme court agreed. The supreme court said the classification of claimants entitled to bring a wrongful death suit for medical negligence is limited to those enumerated in Wis. Stat. § 655.007. It held that § 893.55(4)(f) which limits damages in medical malpractice cases does not expand the classification of claimants under § 655.007, entitled to recover for loss of society and companionship in the wrongful death of a parent caused by medical malpractice to include adult children. The court noted that § 895.04(2) includes adult children in the class of claimants that may recover damages for wrongful death.

In 2012, the Court of Appeals held that Wis. Stat. § 895.04 bars a decedent's adult child from recovering damages for loss of society and companionship if the wrongful death claim belongs to the surviving spouse. Bowen v. American Family Ins. Co., 2012 WI App 29, 340 Wis.2d 232, 811 N.W.2d 887.

If pecuniary loss for wrongful death is limited by a statute in effect at time of accident, the last paragraph should be tailored to advise the jury of the dollar limit on recovery for pecuniary loss, also.

Damage Cap Where Death Occurs in Another State. See Waranka v. State Farm Mut. Auto Ins. Co., 2014 WI 28, 353 Wis.2d 619, 847 N.W.2d 324 and comment to Wis JI-Civil 1870.

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1900.2 SAFE-PLACE STATUTE: DUTY OF EMPLOYER

The immediate employer of (plaintiff) has a duty under the safe-place law to provide safe employment for (his) (her) employees.

Safe employment is broader in scope than a safe place of employment and may require something more than a safe place to work in the physical sense. It includes a safe place to work, but if the work situation is such, it may also require adequate training in the use of equipment, warnings, signals, or devices to advise employees of, and guard against, hazards of which they may not otherwise be apprised.

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The instruction was revised in 1986. The comment was reviewed without change in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

To be used in those cases where the evidence requires a question inquiring of the negligence of the employer. Connar v. West Shore Equip. of Milwaukee, Inc., 68 Wis.2d 42, 227 N.W.2d 660 (1975); Heldt v. Nicholson Mfg. Co., 72 Wis.2d 110, 240 N.W.2d 154 (1976); Miller v. Paine Lumber Co., 202 Wis. 77, 90, 91, 227 N.W. 933 (1930). Mulder v. Acme-Cleveland Corp., 95 Wis.2d 173, 290 N.W.2d 276 (1980).

This instruction would arise in a third-party action.

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1900.4 SAFE PLACE STATUTE: INJURY TO FREQUENTER: NEGLIGENCE OF EMPLOYER OR OWNER OF A PLACE OF EMPLOYMENT

(Give Wis JI-Civil 1005.)

Question 1 asks: Was (defendant) negligent in failing to (construct) (repair) (maintain) the premises as safe as the nature of its business would reasonably permit.

The Wisconsin Legislature enacted a law which is known as the Safe-Place Statute, which applies to this case. That law imposes a duty upon (defendant) in this case to (construct) (repair) (maintain) the premises upon which (plaintiff) was injured so as to make them safe. The law requires (defendant) to (furnish and use safety devices and safeguards) (adopt and use methods and processes) reasonably adequate to render the place of employment safe. Violation of this law is negligence.

The term "safe" or "safety," as used in this law, does not mean absolute safety. The term "safe" or "safety," as applied to the premises in this case, means such freedom from danger to the life, health, safety, or welfare of (plaintiff) as the nature of the premises will reasonably permit.

(Defendant) was not required to guarantee (plaintiff)'s safety but rather was required to (construct) (repair) (maintain) the premises as safe as the nature of the place would reasonably permit.

In determining whether (defendant)'s premises were as free from danger as its nature would permit, you will consider the adequacy of the (construction) (repair) (maintenance) of the premises, bearing in mind the nature of the business and the manner in which the business is customarily conducted.

[**Note**: The following paragraph should not be given where the defect is a structural defect: To find that (defendant) failed to (construct) (repair) (maintain) the

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premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation. However, this notice requirement does not apply where (defendant)'s affirmative act created the defect.]

COMMENT

The instruction and comment were approved by the Committee in 1974. The instruction was revised in 1986, 1992, 1995, 1996, 1998, and 2003. This instruction was renumbered in 1976 from Wis JI-Civil 1900. The comment was updated in 1990, 1993, 1995, 1998, 2001, 2003, 2004, 2006, 2014, and 2020. The instruction was revised in 2003 to specifically refer to the statutory requirements. The 2020 revision updated case law citations.

See Petoskey v. Schmidt, 21 Wis.2d 323, 124 N.W.2d 1 (1963); For the form of the question, see Petoskey, supra; Krause v. V. F. W. Post 6498, 9 Wis.2d 547, 101 N.W.2d 645 (1960).

The safe-place statute imposes a higher standard of care than ordinary negligence at common law, Krause, supra; Saxhaug v. Forsyth Leather Co., 252 Wis. 376, 31 N.W.2d 589 (1948); Dykstra v. Arthur G. McKee & Co., 92 Wis.2d 17, 26, 284 N.W.2d 692 (1979); Topp v. Continental Ins. Co., 83 Wis.2d 780, 266 N.W.2d 397 (1978). Although the safe-place statute establishes a higher standard, failure of a safe place claim does not necessarily preclude a common law negligence claim arising out of the same condition. A safe-place statute addresses the condition of the premises while the common law claim looks at negligent acts. Megal v. Green Bay Area Visitor & Convention Bureau, et al., 2004 WI 98, Case No. 02-2932.

The giving of common-law negligence instruction followed by the safe-place instruction was approved in Carr v. Amusement, Inc., 47 Wis.2d 368, 375, 177 N.W.2d 388 (1970).

Although the statute creates a presumption that an injury was caused by a violation of the statute, the presumption does not establish as a matter of law that the defendant's negligence was greater than the plaintiff's, Brons v. Bischoff, 89 Wis.2d 80, 88, 277 N.W.2d 854 (1979); Fondell v. Lucky Stores, supra; Imnus v. Wisconsin Public Ser. Corp., 260 Wis. 433, 51 N.W.2d 42 (1952).

In reading Wis. Stat. § 101.11, it is suggested that parts dealing solely with employment be omitted, as well as other portions inappropriate under the facts of the case. A community-based residential facility, as defined in Wis. Stat. § 50.01(1), is a place of employment. Wis. Stat. § 101.11(3).

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This instruction applies to an injury to a frequenter. For the definition of "frequenter," see Wis. Stat. § 101.01(2)(e) and JI-Civil 1901. Independent contractor employee as frequenter – McNally v. Goodenough, 5 Wis.2d 293, 300, 92 N.W.2d 890 (1958); Dykstra, supra; Sampson v. Laskin, 66 Wis.2d 318, 326, 224 N.W.2d 594 (1975); Hortman v. Becker Constr. Co., Inc., 92 Wis.2d 210, 226, 284 N.W.2d 621 (1979).

The definition of "safe" and "safety" is from Wis. Stat. § 101.01(2)(g).

Nature of Business. Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 446, 253 N.W. 579 (1934). Free from danger – Olson v. Whitney Bros. Co., 160 Wis. 606, 612-13, 150 N.W. 959 (1915); Dykstra v. Arthur G. McKee & Co., supra; Topp v. Continental Ins. Co., supra at 788; Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 230-31, 270 N.W.2d 205 (1978). An Elks Club was held to be a "place of employment" in Schmorrow v. Sentry Ins. Co., 138 Wis.2d 31, 405 N.W.2d 672 (Ct. App. 1987).

The defendant is not a guarantor of a frequenter's safety. Hipke v. Industrial Comm'n, 261 Wis. 226, 52 N.W.2d 401 (1952).

A business is not an insurer of a frequenter's safety. Zehren v. F. W. Woolworth Co., supra; Dykstra, supra; Stefanovich v. Iowa Nat'l Mut. Ins. Co., 86 Wis.2d 161, 166, 271 N.W.2d 867 (1978); May v. Skelly Oil Co., 83 Wis.2d 30, 36, 264 N.W.2d 574 (1978).

Safety is a relative, not an absolute, term. Sykes v. Bensinger Recreation Corp., 117 F.2d 964, 967 (7th Cir. 1941); Heckel v. Standard Gateway Theater, 229 Wis. 80, 281 N.W. 640 (1938); May v. Skelly, supra.

The statutory duty is to make the place as safe as the nature and place of employment will reasonably permit. Mullen v. Larson-Morgan Co., 212 Wis. 52, 249 N.W. 67 (1933); Saxhaug v. Forsyth Leather Co., supra. This duty is not a lesser standard than that imposed by the common law, Balas v. St. Sebastian's Congregation, 66 Wis.2d 421, 425, 225 N.W.2d 428 (1975).

A place is safe if it is as free from danger as the nature of the employment will reasonably permit when used in a customary or usual manner for the work intended or in such a manner as an ordinarily prudent and careful person might anticipate it might be used. Olson v. Whitney Bros. Co., supra; Topp v. Continental, supra.

The words "construction" or "constructing" should be used when, on the facts, faulty construction is involved.

Notice. Werner v. Gimbel Bros., 8 Wis.2d 491, 99 N.W.2d 708 (1959). There is no requirement of notice where the condition was created by the party sought to be charged. Merriman v. Cash-Way, Inc., 35 Wis.2d 112, 150 N.W.2d 472 (1967); Kosnar v. J. C. Penney Co., 6 Wis.2d 238, 242, 277, 132 N.W.2d 595 (1965).) Or where the alleged defect is a structural defect Hannebaum v. DiRenzo & Bomier, 162 Wis.2d 488, 469 N.W.2d 900 (Ct. App. 1991); see also Fitzgerald v. Badger State Mut. Casualty Co., 67 Wis.2d 321, 227 N.W.2d 444 (1975). Also, if the defendant claims that no defective condition existed, then proof of notice is not necessary. Petoskey v. Schmidt, supra.

The employer must have notice of the defect except where the alleged defect is a structural defect, Fitzgerald, supra. Krause v. V. F. W. Post 6498, supra; Pettric v. Gridley Dairy Co., 202 Wis.

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289, 232 N.W. 595 (1930). As to the length of time of notice required, see Bergevin v. Chippewa Falls, 82 Wis. 505, 52 N.W. 588 (1892); Topp v. Continental Ins. Co., supra at 780; Fitzgerald v. Badger State Mut. Casualty Co., supra at 326; Dykstra, supra; May v. Skelly Oil Co., supra at 36.

Defect Versus Unsafe Condition. This instruction provides that a property owner is liable for injuries caused by a structural defect regardless of whether the owner knew or should have known that the defect existed. However, where the property condition that causes the injury is an unsafe condition associated with the structure, the owner is liable only if it had actual or constructive notice of the condition. This instruction contains an optional paragraph to be used in cases involving a structural defect. This paragraph reads:

> [**Note**: The following paragraph should not be given where the defect is a structural defect. To find that (defendant) failed to (construct) (repair) or (maintain) the premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation. However, this notice requirement does not apply where (defendant)'s affirmative act created the defect.]

A decision of the supreme court discussed whether a loose stairway nosing that caused the plaintiff to fall down stairs was a "structural defect" or an "unsafe condition associated with the structure." The trial judge found that the loose nosing was a structural defect and, therefore, did not instruct the jury on notice. The court said that the classification of the loose nosing was a question of law. Barry v. Employers Mut. Casualty Co., 2001 WI 101, 245 Wis.2d 560, 630 N.W.2d 517. The court concluded that the nosing was an "unsafe condition." Thus, the court said the plaintiff was required to prove the defendant property owner had notice of the condition. Because the jury was not instructed on the notice issue, the court said the case was not fully tried and remanded the case. For a discussion of defect versus unsafe condition, see Mair v. Trollhaugen Ski Resort, 2006 WI 61, 291 Wis.2d 132, 715 N.W.2d 598.

Constructive Notice. An owner or employer is deemed to have constructive notice when that defect or condition has existed a long enough time for a reasonably diligent owner to discover and repair it. May v. Skelley Oil Co., 83 Wis.2d 30, 36 (1978); Strack v. Great Atlantic & Pacific Tea Co., 35 Wis.2d 51, 55 (1967). Constructive notice requires evidence as to the length of time that the condition existed. Kaufman v. State Street Ltd. Partnership, 187 Wis.2d 54, 59 (Ct. App., 1994). Length of time required for constructive notice depends on the surrounding facts and circumstances, including the nature of the business and the nature of the defect. May, 83 Wis.2d at 37. The need for "length of time" evidence (and therefore any constructive notice) is obviated where harm from the method of merchandising is reasonably foreseeable. See Strack, 35 Wis.2d at 55.

Duty to Inspect. Wisconsin Bridge and Iron Co. v. Industrial Comm'n, 8 Wis.2d 612, 618, 99 N.W.2d 817 (1959). There is no duty to inspect and warn unless it is shown that the premises were not in a reasonably safe condition. Balas v. St. Sebastian's, supra.

Acts of Operation Versus an Unsafe Condition. In Stefanovich v. Iowa Nat'l Mut. Ins. Co., supra at 166, the court stated that liability under the safe-place statute is based on unsafe conditions, not

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unsafe acts. See also Korenak v. Curative Workshop Adult Rehabilitation Center, 71 Wis.2d 77, 84, 237 N.W.2d 43 (1976). Similarly, the court in Leitner v. Milwaukee County, 94 Wis.2d 186, 195, 287 N.W.2d 803 (1980), concluded that injuries to a frequenter caused by unsafe conditions of an employer's premises are covered by the safe-place statute, while injuries caused by negligent, inadvertent, or even intentional acts committed therein are not. See also Viola v. Wisconsin Electric Power Co., 2014 WI App 5, 352 Wis.2d 541, 842 N.W.2d 515.

Recreational Use Immunity. If a private property owner is immune from liability under Wis. Stat. § 895.52(2), the owner is not subject to liability under the safe-place statute. However, if the recreational use immunity of § 895.52(2) is negated by Wis. Stat. § 895.52(6) (because the owner collects over $500 in payments), then the safe-place statute may apply to premises used for recreational purposes. Douglas v. Dewey, 154 Wis.2d 451, 453 N.W.2d 500 (Ct. App. 1990).

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1901 SAFE-PLACE STATUTE: DEFINITION OF FREQUENTER

The term "frequenter" means and includes every person except a trespasser who may go in or be in (a place of employment or a public building).

One who goes upon premises owned, occupied, or possessed by another without an invitation, express or implied, extended by the owner, occupant, or possessor, and solely for his or her pleasure, advantage, or purpose is a trespasser and not a frequenter.

The term "express invitation" means a specific invitation to come upon premises. An "implied invitation" is one which may be reasonably assumed from the circumstances which have caused a person to be on the premises of another.

[1. When the (owner) or (possessor) of premises has ordered a contractor to do work upon the premises, it is implied that the employees of the contractor have the invitation and consent of the (owner) or (possessor) to come upon the premises and do the work which has been ordered.]

[2. When a retail merchant, theater proprietor, etc., solicits the patronage of the public in the conduct of business, the invitation could be both express and implied.]

[3. Under some circumstances, an invitee, either express or implied, may be a frequenter of one part of the (owner)'s or (possessor)'s premises and a trespasser in another part to which (he) (she) has not been invited (behind the meat counter, in the boiler room, etc.).]

COMMENT

The instruction and comment were originally published in 1969. The instruction was revised in 1986. The comment was updated in 1980 and 1996. Editorial changes were made in 1992 to address gender references in the instruction.

Wis. Stat. § 101.01(2)(e). Barthel v. Wisconsin Elec. Power Co., 69 Wis.2d 446, 230 N.W.2d 863 (1975).

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Definition of "trespasser": Restatement, Second, Torts § 329 (1965); Antoniewicz v. Reszczynski, 70 Wis.2d 836, 843, 236 N.W.2d 1 (1975); Lloyd v. S. S. Kresge Co., 85 Wis.2d 296, 270 N.W.2d 423 (1978).

Trespasser in portion of building to which a person has not been invited, McNally v. Goodenough, 5 Wis.2d 293, 92 N.W.2d 890 (1958).

Implied invitation, Mustas v. Inland Constr. Inc., 19 Wis.2d 194, 121 N.W.2d 274 (1963); Reddington v. Beefeaters Tables, Inc., 72 Wis.2d 119, 123, 240 N.W.2d 363 (1976).

Wis JI-Civil 1901 is offered to meet a situation where it is an issue of fact whether the plaintiff is a frequenter or trespasser. The instruction is to be used when the verdict inquires whether plaintiff was a frequenter.

The provision of Wis. Stat. § 101.01(2)(d) which says: "Frequenter means every person other than an employee, who may go in or be in a place of employment or a public building" (emphasis added) does not exclude a frequenter from protection by the safe-place statute when on an entranceway to a retail store. Callan v. Peters Constr. Co., 94 Wis.2d 225, 242, 288 N.W.2d 146 (Ct. App. 1979).

An employee of an independent contractor doing work on the premises is a "frequenter working in a place of employment." Hortman v. Becker Constr. Co., Inc., 92 Wis.2d 210, 226, 284 N.W.2d 621 (1979).

The distinction in Wisconsin between invitees and licensees has been abolished. Clark v. Corby, 75 Wis.2d 292, 296-97, 249 N.W.2d 567 (1977).

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1902 SAFE-PLACE STATUTE: NEGLIGENCE OF PLAINTIFF FREQUENTER

(Plaintiff) had a duty to use ordinary care for (his) (her) own safety and protection and to observe the immediate surroundings and all other conditions surrounding (him) (her), and the dangers, if any, which were open and obvious to (him) (her), and to use for (his) (her) safety all such care and caution as the ordinarily prudent person ordinarily uses under like circumstances.

[However, (plaintiff) is not bound absolutely by law to see every hazard or danger, if any exists, in (his) (her) pathway, even should they be plainly observable, nor to remember the existence of every condition of which (he) (her) had knowledge. (Plaintiff) is only required to act as a reasonably prudent person under the same circumstances would act.]

[Ordinary care demands that such vigilance be increased where special circumstances exist. The degree of diligence with respect to keeping a proper lookout on the part of a (customer of a store) — such as (plaintiff) was — in order to measure up to the standard of ordinary care which the law requires varies with the time and place and the conditions which might normally be brought about by weather or traffic into a _____ (mercantile establishment), and the opportunity to observe things ahead of and about (him) (her), and all other circumstances then and there present.]

COMMENT

The instruction and comment were initially approved by the Committee in 1975. The instruction was revised in 1986. The comment was updated in 2003.

Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 253 N.W. 579 (1934).

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Comparative negligence is applicable to violations of the safe place statute. Hofflander v. St. Catherine's Hospital, Inc., 2003 WI 77, 262 Wis.2d 539, 664 N.W.2d 545.

In Hofflander v. St. Catherine's Hospital, supra, the court held that the Safe Place Statute "does not apply to unsafe conditions caused by an injured party's own negligence or recklessness . . ." It also said if a "structure's alleged disrepair requires reckless or negligent conduct by the plaintiff to achieve injury to herself, then the initial disrepair may not be construed as having caused the injury."

For lesser duty of plaintiff workman, see Wis JI-Civil 1051. The cases in the comment to Wis JI-Civil 1051 are of interest also in connection with the above.

The second paragraph is to be added in instances such as the following: plaintiff did not see the platform of weighing scale in the walk space, Zehren v. F. W. Woolworth Co., 11 Wis.2d 539, 542, 105 N.W.2d 563 (1960); plaintiff did not see that the pipes were joined by wire instead of bolts, Vogelsburg v. Mason, et al., 250 Wis. 242, 245, 26 N.W.2d 678 (1947); plaintiff tripped on the step close to the bottom of the door, Hommel v. Badger State Inv. Co., 166 Wis. 235, 249, 165 N.W. 20 (1917).

In connection with the second paragraph, note the following, from Steinhorst v. H. C. Prange Co., 48 Wis.2d 679, 680, 180 N.W.2d 525 (1970): "A customer in a retail store is not bound as a matter of law to see every defect or danger in his pathway, especially where the display of merchandise was so arranged and intended to catch the customer's attention and divert her from watching the floor." See also Carlson v. Drews of Hales Corners, Inc., 48 Wis.2d 408, 180 N.W.2d 546 (1970).

The language of the third paragraph is from Mondl v. F. W. Woolworth Co., 12 Wis.2d 571, 107 N.W.2d 472 (1961). This paragraph is to be used in situations where special conditions actually exist.

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1904 SAFE-PLACE STATUTE: PUBLIC BUILDINGS: NEGLIGENCE OF OWNER

Give Wis JI-Civil 1005.

In addition, the defendant has the duty to comply with the provisions of the statutes of Wisconsin which define a "public building" as any structure used by the public or by three or more tenants and require that every owner of a public building shall so construct, repair, or maintain such public building as to render the same safe. The term "public building" means and includes any structure, including exterior parts of such building, such as a porch, exterior platform, or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or used by the public or by three or more tenants.

(The defendant's building located at _____ Street, at the time in question, was a public building under the provisions of the law just referred to.)

Another section of the Wisconsin statutes provides that the term "safe" or "safety" as applied to a public building means such freedom from danger to the life, health, safety, or welfare of the public as the public building will reasonably permit.

[Here give the last three paragraphs of Wis JI-Civil 1900.4.]

COMMENT

The instruction and comment were originally published in 1965. The instruction was revised in 1986. The comment was reviewed without change in 1990.

Wis. Stat. §§ 101.01(2)(g) and (h) and 101.11(1). The last statute has not been quoted in full. The wording of the statutes should be used to conform with the facts of the case. Krause v. V. F. W. Post 6498, 9 Wis.2d 547, 552, 101 N.W.2d 645, 648 (1960).

The third paragraph (in parentheses) is not to be used unless the building can be held to be a public building as a matter of law. In Knapke v. Grain Dealer Mut. Ins. Co., 54 Wis.2d 525, 527, 197 N.W.2d 737 (1972), a barn was held to be a public building as a matter of law.

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When a safe-place violation has been proved, the law presumes the damage was caused by the failure to perform the safe-place duty. Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 230-31, 270 N.W.2d 205 (1978).

As to unsafe conditions, see Leitner v. Milwaukee County, 94 Wis.2d 186, 194, 287 N.W.2d 803 (1980); Dykstra v. Arthur G. McKee & Co., 92 Wis.2d 17, 284 N.W.2d 692 (1979); Stefanovich v. Iowa Nat'l Mut. Ins. Co., 86 Wis.2d 161, 171, 271 N.W.2d 867 (1978); Zehren v. F. W. Woolworth Co., 11 Wis.2d 539, 105 N.W.2d 563 (1960).

The status of a defendant as an "owner" is discussed in Hortman v. Becker Constr. Co., Inc., 92 Wis.2d 210, 226-31, 284 N.W.2d 621 (1979); Callan v. Peters Constr. Co., 94 Wis.2d 225, 288 N.W.2d 146 (Ct. App. 1979); Ruppa v. American States, Inc., 91 Wis.2d 628, 284 N.W.2d 318 (1979).

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1910 SAFE-PLACE STATUTE: PLACE OF EMPLOYMENT: BUSINESS

To be a place of employment, two things must concur:

First, a place where industry, trade, or business is carried on;

Second, an employment of another for the employer's gain or profit.

The ownership of a (parking lot) (apartment building) (house), and the keeping of the same in repair and renting, does not in and of itself constitute a business; but such transactions may amount to a business within the meaning of the statute if they are carried on to such extent as to require a substantial and habitual application of time and labor in the management and operation of the same.

You will determine from the evidence whether the defendant was conducting a business in the management and operation of the (parking lot) (apartment building) (house) or whether it was only an investment in rental property.

COMMENT

The instruction and comment were initially approved by the Committee in 1963. The instruction was revised in 1986. The comment was updated in 1990.

Wis. Stat. § 101.01(1) (1961); Padley v. Lodi, 233 Wis. 661, 290 N.W. 136 (1940); Cross v. Leuenberger, 267 Wis. 232, 65 N.W.2d 35 (1954); Frion v. Coren, 13 Wis.2d 300, 108 N.W.2d 563 (1960); Waldman v. Young Men's Christian Ass'n, 227 Wis. 43, 46, 277 N.W. 632 (1938); Werner v. Gimbel Bros., 8 Wis.2d 491, 99 N.W.2d 708, 100 N.W.2d 920 (1959); Schwenn v. Loraine Hotel Co., 14 Wis.2d 601, 608-09, 111 N.W.2d 495 (1961); Filipiak v. Plombon, 15 Wis.2d 484, 113 N.W.2d 365 (1962); Brueggeman v. Continental Casualty Co., 141 Wis.2d 406, 415 N.W.2d 531 (Ct. App. 1987); Schmorrow v. Sentry Ins. Co., 138 Wis.2d 31, 405 N.W.2d 672 (Ct. App. 1987).

The term "trade" means an occupation pursued as a business or calling for a livelihood or profit. A place of trade is a place devoted to the business of buying or selling or applying some mechanical vocation. Sharpe v. Hasey, 134 Wis. 618, 114 N.W. 1118 (1908).

The term " industry" means any department or branch of art, occupation, or business conducted for a livelihood or profit, and it applies especially to a distinct branch of trade in which labor and capital are extensively employed. 21 Words and Phrases, Industry 509 (1960, Supp. 1963).

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The term "business" means some particular occupation or employment habitually engaged in for livelihood or profit. Vandervort v. Industrial Comm'n, 203 Wis. 362, 367, 234 N.W. 492 (1931); State v. Joe Must Go Club, 270 Wis. 108, 112, 113, 70 N.W.2d 681 (1955).

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1911 SAFE-PLACE STATUTE: CONTROL

Before a person has a duty to furnish a safe place of employment, the person must have the right to present control over the place so that the person can perform the duty to furnish a safe place of employment. This control of the premises need not be exclusive, nor is it necessary to have control for all purposes in order to impose a duty to furnish a safe place of employment.

If you find under the evidence that (the owner of the property) (the general contractor) (any contractor) (or both) had a duty to furnish a safe place of employment, that duty extends only to such use as the (owner, general contractor, contractor, or both) and (his) (her) employees made of the premises and the effect produced thereon by (his) (her) own work, materials, and equipment within (his) (her) supervision and control.

COMMENT

The instruction and comment were initially approved by the Committee in 1978. The instruction was revised in 1986. The comment was updated in 1990. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction.

Schwenn v. Loraine Hotel Co., 14 Wis.2d 601, 607, 111 N.W.2d 495 (1961); Singleton v. Kubiak & Schmitt, Inc., 9 Wis.2d 472, 101 N.W.2d 619 (1960); Criswell v. Seaman Body Corp., 233 Wis. 606, 290 N.W. 177 (1940); Boyle, Safe Place, §§ 103-04.

See also Couillard v. Van Ess, 141 Wis.2d 459, 415 N.W.2d 554 (Ct. App. 1987).

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1920 NUISANCE: LAW NOTE

The Wisconsin Supreme Court has addressed nuisance law in a number of decisions issued since the Committee last revised the nuisance jury instructions.[1] As a result, the Committee has developed a series of six new instructions which follow this Note. (These instructions all pertain to nuisance actions for damages; actions seeking injunctive relief to abate a nuisance are equitable actions which the courts have jurisdiction to decide without a jury trial.[2])

"NUISANCE" DEFINED

The term "nuisance" refers to a condition or activity which unduly interferes with the use of land or a public place.[3] In the legal sense, it is important to keep in mind that "nuisance" does not refer to the conduct that causes the harm, but to the type of harm caused by the conduct.[4] Also, "nuisance" does not describe a cause of action for the interference, but rather a type of harm that may or may not be actionable. "(I)t is imperative to distinguish between a nuisance and liability for a nuisance, as it is possible to have a nuisance and yet no liability. A nuisance is nothing more than a particular type of harm suffered; liability depends upon the existence of underlying tortious acts that cause the harm."[5]

CLASSIFICATION OF NUISANCES

Nuisances can be classified based on the type of interference involved and the nature of the conduct which is alleged to give rise to liability for the nuisance.

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Nuisances are divided into two types, depending on the nature of the interference: private or public. A private nuisance is a nontrespassory invasion of or interference with an interest in the private use and enjoyment of land.[6] A public nuisance is a condition or activity which unreasonably interferes with the use of a public place or with the activities of an entire community.[7] "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."[8]

Although the type of harm suffered in the case of a private nuisance is different than that suffered where there is a public nuisance, the prerequisites to liability in either case are virtually identical.[9] In either case, the plaintiff must demonstrate that the interference resulted in significant harm.[10] There can be situations in which a plaintiff has a cause of action for both a private nuisance and a public nuisance arising out of the same conduct.[11]

The conduct giving rise to liability for creating or maintaining a nuisance can be either intentional or unintentional. A nuisance is the result of intentional conduct if the defendant either (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct. It is not necessary that the defendant act with a malicious intent to harm the plaintiff; the defendant need only realize that the nuisance is substantially certain to result from his conduct, even if the conduct itself has a laudable purpose.[12]

Liability can also arise from unintentional conduct. Where the plaintiff alleges the defendant unintentionally maintained or failed to abate a nuisance, the traditional rules for liability based on negligent conduct apply.[13] The usual defenses in a negligence action are also available to the defendant.[14]

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There are situations where unintentional conduct can subject the defendant to strict liability regardless of the defendant's negligence. The Restatement describes these cases as arising out of conduct which is "abnormally dangerous."[15] Wisconsin court decisions suggest these types of nuisances are those unintentionally "created" as opposed to "maintained" by the defendant[16] Examples of what the Restatement and Wisconsin reported decisions refer to by these types of nuisances include a tannery or slaughter-house in a residential area, ownership of a vicious dog and blasting activities in an inappropriate place. In these cases, liability "does not rest on the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care."[17] In such situations, the defendant is subject to strict liability[18] and "no question of negligence or want of liability is involved."[19]

The Committee determined there should be a total of six separate instructions covering the various claims for liability based on nuisance. The appropriate classification of nuisances is shown in the following table:

CLASSIFICATION OF NUISANCES					
PRIVATE			PUBLIC		
INTENTIONAL CONDUCT	UNINTENTIONAL CONDUCT		INTENTIONAL CONDUCT	UNINTENTIONAL CONDUCT	
	Created by/ abnormally dangerous activity	Negligence		Created by/ abnormally dangerous activity	Negligence

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The instructions differentiate between claims for private and public nuisance. Within each of those classifications, there are separate instructions depending on whether the conduct involved is alleged to be intentional or unintentional. Finally, the instructions involving unintentional conduct differentiate between claims alleging negligence and claims alleging the conduct of an abnormally dangerous activity for which the defendant is strictly liable.

COMMENT

This law note was approved by the committee in 2009. The comment was updated in 2019.

[1] *See, e.g., Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77 (2002); *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635 (2005); *City of Milwaukee v. NL Industries*, 315 Wis.2d 443 (2008).

[2] *United States v. Richards*, 201 Wis. 130 (1930).

[3] *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002).

[4] Restatement (Second) of Torts § 821A, Comment b (1979).

[5] *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 (2005).

[6] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D. While the definition of a private nuisance in Restatement (Second) of Torts § 821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin case law consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts § 821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002).

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[7] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, ¶ 21. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See also Prosser and Keeton on Torts* § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶ 21; *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' *Costas*, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord)." *Id.* at 658-659.

[8] Restatement (Second) of Torts § 821C(1) (1979).

[9] "However, since the principal difference between a public and private nuisance lies in the nature of the interest violated or affected by the wrongful conduct, the elements required to establish liability for either are virtually identical." *Milwaukee Metropolitan Sewerage District, supra,* at 668.

"But as the tort action came into the picture, the use of the single word 'nuisance' to describe both the public and the private nuisance, led to the application in public nuisance cases, both criminal and civil, of an analysis substantially similar to that employed for the tort action for private nuisance." Restatement (Second) of Torts § 821B, comment e (1979).

[10] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts § 821F.

[11] Restatement (Second) of Torts § 821B, Comment h (1979).

[12] *Milwaukee Metropolitan Sewerage District, supra* at 663; Restatement (Second) of Torts § 825 (1979).

[13] *Milwaukee Metropolitan Sewerage District, supra* at 667-668; Restatement (Second) of Torts § 822 (1979).

[14] *Milwaukee Metropolitan Sewerage District, supra* at 668.

[15] Restatement (Second) of Torts § 822 (1979). *See, also,* Restatement (Second) of Torts § 519, 520 and Comments.

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[16] "[I]n those cases where the nuisance is created by the defendant, no question of negligence or want of ordinary care is involved. As we explained in *Brown*, this rule applies in cases such as 'a tannery or a slaughter-house in the midst of a residential area, where the mere act of using the plant creates the nuisance.' *Id.*" *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 661 (2005), quoting from *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929). This quoted language from *Brown* appears to square with language in the comments to Restatement (Second) of Torts § 822, though the Restatement uses different terminology. Comment c to Restatement of Torts § 822 describes the bases for nuisance liability as follows:

> "An invasion of a person's interest in the private use and enjoyment of land by any type of liability-forming conduct is private nuisance. The invasion that subjects a person to liability may be either intentional or unintentional. A person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case, and he is subject to liability for an unintentional invasion when his conduct is negligent, reckless *or abnormally dangerous*. These are the types of conduct that are stated in this Chapter as subjecting a person to liability for invasions of interests in the private use and enjoyment of land." (emphasis added). Restatement (Second) of Torts § 822, Comment c (1979).

The Comment makes clear that an unintentional invasion is actionable not only if the defendant's conduct is negligent or reckless, but also if it is "abnormally dangerous." The language in *Milwaukee Metropolitan Sewerage District* referencing the holding in *Brown, supra,* that no question of negligence is involved where the defendant created the nuisance, appears to contemplate the same type of conduct which the Comment in the Restatement characterizes as "abnormally dangerous." *Brown* gives as an example a "tannery or slaughter-house in a residential area." Comment j to § 822 gives the following examples:

> "The last basis for liability for a private nuisance is the defendant's abnormally dangerous activity, enterprise or maintained condition, under the rules stated in Chapters 20 and 21. Thus a dog known by the owner to be vicious may create a private nuisance when it interferes with the use or enjoyment of the land next door, and the owner may be subject to strict liability because of his knowledge of the dog's propensities. So likewise, blasting activities or the storage of a large quantity of explosives in an inappropriate place may create a private nuisance because of the resulting interference with the use and enjoyment of land in the vicinity."

Thus, although there has been no reported Wisconsin decision explicitly involving nuisance liability predicated on abnormally dangerous behavior, the Committee believes the court's discussion of nuisances "created by" the defendant in *Milwaukee Metropolitan Sewerage District* is intended to describe what the Restatement regards as abnormally dangerous behavior. (For specific recognition that Wisconsin recognizes intentional conduct, negligence and abnormally dangerous activity as the three grounds for maintaining a nuisance claim, *see, Physicians Plus, supra* at 145-146, J. Bradley concurring.) The Committee also believes "abnormally dangerous activity" is a better description of the conduct which triggers strict liability than the reference to a nuisance "created" by the defendant for a number of reasons. First, "abnormally dangerous activity" is a more precise description the type of conduct necessary to trigger strict liability. Second, use of the term "created" to describe situations where strict liability applies appears to have its origins from a time when a nuisance itself was considered actionable without any underlying tortious conduct. The *Brown* decision includes the following language: "'Negligence of the defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the wrongful act in *creating or maintaining* it, and the negligence of the defendant, unless in

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exceptional cases, is not material.' *Lamming v. Galusha,* 135 N.Y. 239, 242, 31 N.E. 1024. *See, also,* Joyce, Nuisances, 80." (emphasis added) *Brown, supra,* at 589. While *Milwaukee Metropolitan Sewerage District* quotes *Brown* for the proposition that negligence need not be proved where the defendant *created* a nuisance, *Brown* itself concludes that negligence need not be demonstrated where the defendant *maintained* a nuisance either. *Lamming*, the New York case cited for this proposition in *Brown*, was decided in 1892. *Lamming* itself quoted the language from *Congreve v. Smith,* 18 N. Y. 79, an 1858 New York appeals court decision. As noted in Restatement (Second) of Torts §822, Comment b:

> "In early tort law the rule of strict liability prevailed. An actor was liable for the harm caused by his acts whether that harm was done intentionally, negligently or accidentally. In course of time the law came to take into consideration not only the harm inflicted but also the type of conduct that caused it, in determining liability. This change came later in the law of private nuisance than in other fields."

Whether the quoted language from *Brown* represents the current state of the law or is a remnant from the days when there was liability for a nuisance without tortious conduct is open to question. However, the relatively recent evolution of nuisance liability rules is another reason the Committee concludes that "abnormally dangerous activity" is a better description than a nuisance "created" by the defendant when referring to a situation that gives rise to strict liability.

[17] *Milwaukee Metropolitan Sewerage District, supra* at 661, quoting from *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929).

[18] Restatement (Second) of Torts § 822, Comment a (1979).

[19] *Brown v. Milwaukee Terminal Rwy. Co.*, 199 Wis 575, 589 (1929).

Anticipated Nuisance Claim. Under Wisconsin case law, "anticipated private nuisance" claims are recognized claims. Krueger v. AllEnergy Hixton, LLC., 384 Wis.2d 127, 132, 918 N.W. 2d 458 (2018). Such an action may be brought when the alleged anticipated nuisance "will necessarily result from the contemplated act or thing which it is [s]ought to enjoin." See Wergin v. Voss, 179 Wis 603, 606, 192 N.W. 51 (1923). A claim for anticipated nuisance must include factual allegations that, if true, would support each of the following conclusions:

> the defendant's proposed conduct will 'necessarily' or 'certainly' create a nuisance; and
>
> the resulting nuisance will cause the claimant harm that is 'inevitable and undoubted.'" See Wergin, 179 Wis. At 606-07.

Although Kruger focuses on an anticipated private nuisance claim, the most pertinent Wisconsin case also contemplates anticipated public nuisance claims. See Wergin v. Voss, 179 Wis 603, 606, 192 N.W. 51 (1923). While the court in Kruger used the term "anticipated" nuisance, synonymous terms include "threatened" nuisance, "prospective" nuisance, and "anticipatory" nuisance. See Wergin, 179 Wis at 606.

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Filing a Written Notice of Injury. Each alleged nuisance causing action constitutes a separate "event" for the purposes of filing a written notice of injury. See The Yacht Club at Sister Bay Condominium Ass'n, Inc. v. Village of Sister Bay, 2019 WI 4, 922 N.W.2d 95, 101 (2019), reversing in part and remanding 378 Wis.2d 742, 905 N.W.2d 844 (Ct. App. 2017). Future nuisance actions are not barred if the written notice of injury pertaining to the new "event" giving rise to the claim is filed within 120 days after the happening of the event. Wis. Stat. § 893.80 (1d)(a).

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1922 PRIVATE NUISANCE: NEGLIGENT CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) was negligent.[5] A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, (does something) (fails to do something) that a reasonable person would recognize as creating an unreasonable risk of (invading or) interfering with another's use or enjoyment of property.

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[WHERE NUISANCE IS PREDICATED UPON FAILURE TO ABATE, ADD THE FOLLOWING: A person is not negligent for failing to abate a private nuisance unless the nuisance existed long enough that (defendant) knew or should have known of the nuisance and could have remedied it within a reasonable period of time.][6]

Fourth, (defendant)'s negligence caused the private nuisance. This does not mean that (defendant)'s negligence was "*the* cause" but rather "*a* cause" because a private nuisance may have more than one cause. Someone's negligence caused the private nuisance if it was a substantial factor in producing the nuisance. [A private nuisance may be caused by one person's negligence or by the combined negligence of two or more people.]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff)?[7]

ANSWER: _____
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Was (defendant) negligent?

ANSWER: _____
(Yes/No)

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Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant's) negligence a cause of the private nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

Question No. 5: Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

Question No. 6: If you answered "Yes" to Question No. 5, then answer this question:

Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Taking the total negligence which caused the harm suffered to be 100%, what percentage of the total negligence do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

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Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

[2] Insert appropriate tense depending on the facts of the case.

[3] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. *See,* Restatement (Second) of Torts §821D, Comment d. "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." *Id.*

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F. The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second)

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of Torts §821F.

[5] This portion of the instruction is patterned after JI 1005 Negligence: Defined. "(a)n essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is 'otherwise actionable under the rules controlling liability for negligent . . . conduct.'" Restatement (Second) of Torts §822, quoted in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 667 (2005).

[6] Liability can arise from the failure to abate a nuisance, even if the condition causing the nuisance did not originate with the defendant. If the trial judge concludes a jury instruction further explaining the meaning of "failed to abate" would be helpful, *see, e.g.,* Restatement (Second) of Torts §839 for an explanation of the concept.

Where liability is premised on the failure to abate a nuisance, the plaintiff must prove the defendant had notice of the nuisance. "Here, MMSD alleges that the City was negligent in failing to repair the water main before it broke. As discussed *supra*, in *Brown* we specifically stated that when liability for a nuisance is predicated upon a failure to act (failure to abate a nuisance), notice of the defective condition is a prerequisite to liability. *Brown*, 199 Wis. at 589-90. The Restatement (Second) of Torts § 824 provides that no liability for nuisance can attach based on a failure to act unless the actor was under a duty to act - that is, unless he has knowledge or notice of the nuisance condition. Further, in *Schiro*, 272 Wis. at 546-47, we noted that when a nuisance is premised on negligent conduct, failing to allow the defendant the same defenses as he would have in a negligence action would render liability dependent on the label the plaintiff used on the pleading and not the defendant's underlying conduct. We therefore conclude that notice is a necessary part of the plaintiff's proof in an action for nuisance when liability is predicated upon the defendant's alleged negligent failure to act, regardless of whether the nature of the harm is public or private." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 669-670 (2005).

The defendant is entitled to a reasonable time within which to remedy the interference after receiving notice of it. Restatement (Second) of Torts §839(c) and Comment *i.*

[7] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

[8] "Since proof of negligence is essential to a negligence-based nuisance claim, our courts have repeatedly held that when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable. *See, e.g.,* Vogel, 201 Wis. 2d at 425; *Stunkel*, 229 Wis. 2d at 669-70." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 668(2005). In cases involving nuisance resulting from negligent conduct, the plaintiff's contributory negligence is a defense to the same extent as in other cases founded on negligence. Restatement (Second) Torts §840B.

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1924 PRIVATE NUISANCE: ABNORMALLY DANGEROUS ACTIVITY: STRICT LIABILITY[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) engaged in an abnormally dangerous activity.[5] In determining whether an activity is abnormally dangerous, you should consider the following factors:

(a) existence of a high degree of risk of some harm to another's interest in the private use and enjoyment of land;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

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(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Fourth, (defendant)'s conduct caused the private nuisance. This does not mean that (defendant)'s conduct was "*the* cause" but rather "*a* cause" because a private nuisance may have more than one cause. Someone's conduct caused the private nuisance if it was a substantial factor in producing the nuisance. [A private nuisance may be caused by one person's conduct or by the combined conduct of two or more people.][6]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff)?[7]

ANSWER: _____
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Did (defendant) engage in an abnormally dangerous activity?

ANSWER: _____
(Yes/No)

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Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant's) abnormally dangerous activity a cause of the private nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

Question No. 5: If you answered "Yes" to Question 4, then answer this question:

Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

Question No. 6: If you answered "Yes" to Question No. 5, then answer this question:

Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Assuming (defendant's) abnormally dangerous activity and (plaintiff's) negligence caused 100% of the harm to (plaintiff), what percentage do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

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Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

This instruction is to be used where the plaintiff alleges the nuisance was the result of an abnormally dangerous activity conduct by the defendant. In such cases the defendant is subject to strict liability even in the absence of negligent conduct. *See*, JI 1920, note 16.

[2] Insert appropriate tense depending on the facts of the case.

[3] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. *See,* Restatement (Second) of Torts §821D, Comment d (1979). "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." *Id.*

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d (1979). "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the

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term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F (1979). The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

[5] The criteria for determining whether an activity is abnormally dangerous are set forth in Restatement (Second) of Torts §520:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

§520 has been recognized as a part of the common law in Wisconsin. *Fortier v. Flambeau Plastics Co.,* 164 Wis.2d 639, 667 (Ct. App 1991).

Comment *l* to Restatement (Second) Torts §520 (1979) provides that the determination of whether the actions of the defendant constitute an abnormally dangerous activity is to be made by the court, not the jury:

> *l. Function of court.* Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.

Wisconsin caselaw clearly agrees that the determination of whether an activity is abnormally dangerous is one for the court when the facts are undisputed. "If the facts are undisputed, whether an activity is abnormally dangerous 'is to be determined by the court, upon consideration of all the factors listed in [sec. 520], and the weight given to each that it merits upon the facts in evidence.' Section 520, comment 1." *Fortier v. Flambeau Plastics Co., supra,* at 668. While *Fortier* quotes comment l with approval, the decision limits that approval to cases where the facts are undisputed. Whether the question is one for the court or the jury when the facts are disputed has yet to be specifically addressed by any reported Wisconsin decision. The Committee believes that in the absence of any authority allowing the court to make the determination, the question should be put to the jury as would be any other question of fact.

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[6] This language is patterned after WIS JI 1500, which relates to cause in a negligence action. However, the wording is changed to refer to the defendant's "conduct" rather than the defendant's "negligence" because where the nuisance is caused by the defendant's engagement in an abnormally dangerous activity, negligence is not a prerequisite to liability.

[7] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

[8] In an appropriate case, the defendant may be entitled to a comparative negligence instruction and verdict question. The Wisconsin Supreme Court has held, in the context of strict liability arising out of a defective product, that contributory negligence on the part of the plaintiff can reduce defendant's liability under the comparative negligence statute:

> "At this juncture we find no reason why acts or failure on the part of the user or consumer of defective products which constitute a failure to exercise reasonable care for one's own safety and might ordinarily be designated assumption of risk cannot be considered contributory negligence. . . .
>
> It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se. . . .
>
> [A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." *Dippel v. Sciano*, 37 Wis.2d 443, 461-462 (1967).

Restatement (Second) of Torts §840B (1979) requires a higher level of negligence on the part of the plaintiff before the jury can consider a claim of contributory negligence. Specifically, §840B(3) provides that "When the nuisance results from an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected himself to the risk of harm." The Committee believes that the holding in *Dippel* applies to a strict liability nuisance claim and a defendant in Wisconsin is not required to meet the higher burden of Restatement (Second) of Torts §840B(3) in order to support a claim of contributory negligence.

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1926 PRIVATE NUISANCE: INTENTIONAL CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) intentionally caused the private nuisance. A person's conduct caused the private nuisance if it was a substantial factor in producing the nuisance.
A nuisance is intentional if the person acts for the purpose of causing the nuisance or knows that the nuisance is resulting or is substantially certain to result from the person's conduct.[5]

Fourth, (defendant's) conduct in causing the nuisance was unreasonable.[6] An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if:
(a) the gravity of the harm outweighs the utility of the actor's conduct, or

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(b) the harm caused by the conduct is serious and the cost of compensating for this and similar harm to others would still make it feasible for (defendant) to continue the conduct.[7]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff)?[8]

ANSWER: _____
(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Did (defendant) intentionally cause the private nuisance?

ANSWER: _____
(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant's) conduct in causing the nuisance unreasonable?

ANSWER: _____
(Yes/No)

Question No. 5: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

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[2] Insert appropriate tense depending on the facts of the case.

[3] "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. *See,* Restatement (Second) of Torts §821D, Comment d. "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." *Id.*

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, *supra*, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." *Physicians Plus v. Midwest Mutual*, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F (1979). The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

[5] Restatement (Second) of Torts §825.

[6] "In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability." Restatement (Second) of Torts §821D, Comment d.

[7] Restatement (Second) of Torts §826.

[8] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

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1928 PUBLIC NUISANCE: NEGLIGENT CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one. Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

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Third, (defendant) was negligent.[5] A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, (does something) (fails to do something) that a reasonable person would recognize as creating an unreasonable risk of (invading or) interfering with another's use or enjoyment of property.

[WHERE NUISANCE IS PREDICATED UPON FAILURE TO ABATE, ADD THE FOLLOWING: A person is not negligent for failing to abate a public nuisance unless the nuisance existed long enough that (defendant) knew or should have known of the nuisance and could have remedied it within a reasonable period of time.][6]

Fourth, (defendant)'s negligence caused the public nuisance. This does not mean that (defendant)'s negligence was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's negligence caused the public nuisance if it was a substantial factor in producing the public nuisance. [A public nuisance may be caused by one person's negligence or by the combined negligence of two or more people.][7]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____
(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[8]

ANSWER: _____
(Yes/No)

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Question No. 3: If you answered "Yes" to Question 2, then answer this question: Was (defendant) negligent?

ANSWER: _____
(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question: Was (defendant's) negligence a cause of the harm suffered by (plaintiff) as a result of the public nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][9]

Question No. 5: Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

Question No. 6: If you answered "Yes" to Question No. 5, then answer this question: Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Taking the total negligence which caused the harm suffered to be 100%, what percentage of the total negligence do you attribute to:

Plaintiff -Percentage:_____%
Defendant -Percentage:_____%
Total: 100%

Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

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COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate nuisance jury instruction.

[2] Insert appropriate tense depending on the facts of the case.

[3] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See, also,* Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon.*' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶ 21; *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' *Costas*, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord)." *Id.* at 658-659.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

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(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The court in *Physicians Plus* characterized its definition of a public nuisance as consistent with this Restatement definition. *Physicians Plus*, *supra,* at 102 and footnote 15. Restatement (Second) of Torts §821B Comment *e* points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." *Id.*, Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. *See* Comments b and c to Restatement 2d Torts, §821C.

[5] This portion of the instruction is patterned after JI 1005 Negligence: Defined. "(a)n essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is 'otherwise actionable under the rules controlling liability for negligent . . . conduct.'" Restatement (Second) of Torts §822, quoted in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 667 (2005). While this quoted language applies in the case of a private nuisance, the rule applies to public nuisances as well. "However, since the principal difference between a public and private nuisance lies in the nature of the interest violated or affected by the wrongful conduct, the elements required to establish liability for either are virtually identical." *Milwaukee Metropolitan Sewerage District, supra,* at 668.

[6] Liability can arise from the failure to abate a nuisance, even if the condition causing the nuisance did not originate with the defendant. If the trial judge concludes a jury instruction further explaining the meaning of "failed to abate" would be helpful, *see, e.g.,* Restatement (Second) of Torts §839 for an explanation of the concept.

Where liability is premised on the failure to abate a nuisance, the plaintiff must prove the defendant had notice of the nuisance. "Here, MMSD alleges that the City was negligent in failing to repair the water main before it broke. As discussed *supra*, in *Brown* we specifically stated that when liability for a nuisance is predicated upon a failure to act (failure to abate a nuisance), notice of the defective condition is a prerequisite to liability. *Brown*, 199 Wis. at 589-90. The Restatement (Second) of Torts § 824 provides that no liability for nuisance can attach based on a failure to act unless the actor was under a duty to act - that is, unless he has knowledge or notice of the nuisance condition. Further, in *Schiro*, 272 Wis. at 546-47, we noted that when a nuisance is premised on negligent conduct, failing to allow the defendant the same defenses as he would have in a negligence action would render liability dependent on the label the plaintiff used on the

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pleading and not the defendant's underlying conduct. We therefore conclude that notice is a necessary part of the plaintiff's proof in an action for nuisance when liability is predicated upon the defendant's alleged negligent failure to act, regardless of whether the nature of the harm is public or private." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 669-670 (2005).

The defendant is entitled to a reasonable time within which to remedy the interference after receiving notice of it. Restatement (Second) of Torts §839(c) and Comment *i*.

[7] This paragraph is taken from JI 1500 Cause, as part of the rule that "when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee, supra,* at 668.

[8] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

[9] "Since proof of negligence is essential to a negligence-based nuisance claim, our courts have repeatedly held that when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable. *See, e.g.,* Vogel, 201 Wis. 2d at 425; *Stunkel*, 229 Wis. 2d at 669-70." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 668(2005). In cases involving nuisance resulting from negligent conduct, the plaintiff's contributory negligence is a defense to the same extent as in other cases founded on negligence. Restatement (Second) Torts §840B.

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1930 PUBLIC NUISANCE: ABNORMALLY DANGEROUS ACTIVITY: STRICT LIABILITY[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.) [3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one. Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

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Third, (defendant) engaged in an abnormally dangerous activity.[5] In determining whether an activity is abnormally dangerous, you should consider the following factors:

(a) existence of a high degree of risk of some harm to another's interest in the private use and enjoyment of land;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Fourth, (defendant)'s conduct caused the public nuisance. This does not mean that (defendant)'s conduct was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's conduct caused the public nuisance if it was a substantial factor in producing the public nuisance. [A public nuisance may be caused by one person's conduct or by the combined conduct of two or more people.][6]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____

(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

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Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[7]

ANSWER: _____

(Yes/No)

Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Did (defendant) engaged in an abnormally dangerous activity?

ANSWER: _____

(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant)'s abnormally dangerous activity a cause of the public nuisance ?

ANSWER: _____

(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

Question No. 5: If you answered "Yes" to Question 4, then answer this question:

Was (plaintiff) negligent?

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ANSWER: _____

(Yes/No)

Question No. 6: If you answered "Yes" to Question No. 5, then answer this question: Was (plaintiff)'s negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____

(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Assuming (defendant)'s abnormally dangerous activity and (plaintiff)'s negligence caused 100% of the harm to (plaintiff), what percentage do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

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Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

This instruction is to be used where the plaintiff alleges the nuisance was the result of an abnormally dangerous activity conduct by the defendant. In such cases the defendant is subject to strict liability even in the absence of negligent conduct. *See*, JI 1920, note 16.

[2] Insert appropriate tense depending on the facts of the case.

[3] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See, also,* Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶ 21; *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.'

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Costas, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord)." *Id.* at 658-659.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The court in *Physicians Plus* characterized its definition of a public nuisance as consistent with this Restatement definition. *Physicians Plus, supra,* at 102 and footnote 15. Restatement (Second) of Torts §821B Comment *e* points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." *Id.*, Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. *See* Comments b and c to Restatement 2d Torts, §821C.

[5] The criteria for determining whether an activity is abnormally dangerous are set forth in Restatement (Second) of Torts §520:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

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(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

§520 has been recognized as a part of the common law in Wisconsin. *Fortier v. Flambeau Plastics Co.,* 164 Wis.2d 639, 667 (Ct. App 1991).

Comment *l* to Restatement (Second) Torts §520 (1979) provides that the determination of whether the actions of the defendant constitute an abnormally dangerous activity is to be made by the court, not the jury:

> *l. Function of court.* Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.

Wisconsin caselaw clearly agrees that the determination of whether an activity is abnormally dangerous is one for the court when the facts are undisputed. "If the facts are undisputed, whether an activity is abnormally dangerous 'is to be determined by the court, upon consideration of all the factors listed in [sec. 520], and the weight given to each that it merits upon the facts in evidence.' Section 520, comment 1." *Fortier v. Flambeau Plastics Co., supra,* at 668. While *Fortier* quotes comment l with approval, the decision limits that approval to cases where the facts are undisputed. Whether the question is one for the court or the jury when the facts are disputed has yet to be specifically addressed by any reported decision. The Committee believes that in the absence of any authority allowing the court to make the determination, the question should be put to the jury as would be any other question of fact.

[6] This language is patterned after WIS JI 1500, which relates to cause in a negligence action. However, the wording is changed to refer to the defendant's "conduct" rather than the defendant's "negligence" because where the nuisance is caused by the defendant's engagement in an abnormally dangerous activity, negligence is not a prerequisite to liability.

[7] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

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[8] In an appropriate case, the defendant may be entitled to a comparative negligence instruction and verdict question. The Wisconsin Supreme Court has held, in the context of strict liability arising out of a defective product, that contributory negligence on the part of the plaintiff can reduce defendant's liability under the comparative negligence statute:

> "At this juncture we find no reason why acts or failure on the part of the user or consumer of defective products which constitute a failure to exercise reasonable care for one's own safety and might ordinarily be designated assumption of risk cannot be considered contributory negligence. . . .
>
> It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se. . . .
>
> [A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." *Dippel v. Sciano*, 37 Wis.2d 443,461-462 (1967).

Restatement (Second) of Torts §840B (1979) requires a higher level of negligence on the part of the plaintiff before the jury can consider a claim of contributory negligence. Specifically, §840B(3) provides that "When the nuisance results from an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected himself to the risk of harm." The Committee believes that the holding in *Dippel* applies to a strict liability nuisance claim and a defendant in Wisconsin is not required to meet the higher burden of Restatement (Second) of Torts §840B(3) in order to support a claim of contributory negligence.

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1932 PUBLIC NUISANCE: INTENTIONAL CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one. Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

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Third, (defendant) intentionally caused the public nuisance. A person's conduct caused the public nuisance if it was a substantial factor in producing the nuisance.

A nuisance is intentional if the person acts for the purpose of causing the nuisance or knows that the nuisance is resulting or is substantially certain to result from the person's conduct.[5]

Fourth, (defendant's) conduct in causing the nuisance was unreasonable.[6] An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if:

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the cost of compensating for this and similar harm to others would still make it feasible for (defendant) to continue the conduct.[7]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____

(Yes/No)

Question No. 2: If you answered "Yes" to Question 1, then answer this question:

Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[8]

ANSWER: _____

(Yes/No)

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Question No. 3: If you answered "Yes" to Question 2, then answer this question:

Did (defendant) intentionally cause the public nuisance?

ANSWER: _____

(Yes/No)

Question No. 4: If you answered "Yes" to Question 3, then answer this question:

Was (defendant)'s conduct in causing the nuisance unreasonable?

ANSWER: _____

(Yes/No)

Question No. 5: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

COMMENT

This instruction was approved by the committee in 2009.

NOTES

[1] *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate nuisance jury instruction.

[2] Insert appropriate tense depending on the facts of the case.

[3] "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' *Physicians Plus*, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. *See, also,* Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury

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involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon.*' *Costas v. City of Fond du Lac*, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). *See also Physicians Plus*, 254 Wis.2d 77, ¶ 21; *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' *Costas*, 24 Wis. 2d at 413-14. *See also* Restatement (Second) of Torts § 821B cmt. h (accord)." *Id.* at 658-659.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The court in *Physicians Plus* characterized its definition of a public nuisance as consistent with this Restatement definition. *Physicians Plus, supra,* at 102 and footnote 15. Restatement (Second) of Torts §821B Comment *e* points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

[4] "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." *Id.*, Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. *See* Comments b and c to Restatement 2d Torts, §821C.

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[5] Restatement (Second) of Torts §825.

[6] The concept of unreasonableness described in the first element involves the unreasonableness of the interference with the use of a public place or the activities of an entire community and is an inherent part of the definition of a public nuisance itself. This fourth element requires the jury to find, in addition, that the particular actions of the defendant in creating the unreasonable interference were unreasonable themselves.

The standard in the instruction for evaluating the reasonableness of the defendant's conduct is taken from Restatement (Second) of Torts §826. Additional guidance in applying the standard can be found in Restatement (Second) of Torts §§827-831.

[7] Restatement (Second) of Torts §826.

[8] In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

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2000 INTENTIONAL TORT: LIABILITY OF MINOR

The fact that _____ was a minor, that is, under the age of 18, does not excuse (him) (her) in any way from liability for the injury (if any) caused to _____. You will consider (his) (her) liability just as if (he) (she) were an adult.

COMMENT

The instruction and comment was originally published in 1963. The comment was updated in 1990. A citation was corrected in 2014.

Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891 (assault by child aged 14); Wisconsin Loan and Fin. Co. v. Goodnough, 201 Wis. 101, 107, 288 N.W. 484 (1930) (misrepresentation by minor aged 19); Kiefer v. Fred Howe Motors, Inc., 39 Wis.2d 20, 26, 158 N.W.2d 288 (1968).

If the tort involves the mental element of malice, the child must be old enough to form this mental attitude. See Kiefer v. Fred Howe Motors, Inc., supra.

A minor who acts maliciously may be liable for punitive damages. Anello v. Savignac, 116 Wis.2d 246, 342 N.W.2d 440 (Ct. App. 1983).

See Annot., 67 A.L.R. 573 (1930) and 67 A.L.R.2d 570-78, "Tort Liability of Child of Tender Age," and Wis JI-Civil 1010, Negligence of Children.

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2001 INTENTIONAL VERSUS NEGLIGENT CONDUCT

There is a dispute in this case about whether the conduct of (defendant) in _____ (state the conduct in question) was intentional or negligent.

If (defendant) actually meant some harm to follow from a particular act or where some harm is substantially certain to follow from an act according to common experience, then (defendant) may be said to have intended the result and (his) (her) conduct was intentional.

Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor actually means to cause injury by his or her conduct or where injury is almost certain to occur from the actor's conduct.

If you find that the defendant intended to cause harm in some way, however great or small, or that (defendant)'s conduct was almost certain to cause harm in some way, however great or small, then (defendant)'s conduct was intentional.

If, however, the conduct of (defendant) merely created a risk of some harm to someone, which may or may not have resulted, then (defendant)'s conduct was negligent as opposed to intentional.

COMMENT

This instruction and comment were approved by the Committee in 1995. The instruction needs to be preceded or followed by the negligence instruction (JI-Civil 1005).

This instruction is based on the language in Gouger v. Hardtke, 167 Wis.2d 504, 512, 463 N.W.2d 882 (1992), where two classmates were involved in a mechanical shop class incident. Plaintiff threw a soapstone (metal marking chalk) at defendant hitting him in the head. Defendant retaliated and hit plaintiff in the eye. Plaintiff suffered vision impaired as a result and sued. The suit was not commenced until the statute of limitations had run on the intentional tort. Plaintiff alleged defendant's conduct in throwing the soapstone was negligent. Defendant's insurer had placed an "intentional acts" exclusion in its policy and argued defendant's act of throwing the soapstone was clearly intentional and therefore excluded from coverage under the policy. The trial court and the court of appeals agreed with the insurer, but the Supreme Court reversed, holding that under these facts, intent could not be inferred as a matter

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of law; i.e., there was an issue of fact as to whether defendant's conduct was intentional or merely negligent. The Gouger decision also drew a distinction between the intent to hit and the intent to injure:

> Significantly, the affidavit does not state that Hardtke was trying to or intended to injure Gouger; he merely intended to hit him. As explained above, the intent to hit does not translate automatically into an intent to injure.

167 Wis.2d at 516.

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2004 ASSAULT

An assault occurred if:

1. (Defendant) intended to cause physical harm to (plaintiff); and

2. (Defendant) acted to cause (plaintiff) to reasonably believe (defendant) had the present intent and ability to harm (plaintiff).

The requirement that (defendant) intended to cause bodily harm means that (defendant) had the mental purpose to cause bodily harm to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause bodily harm to (plaintiff) (or another person).

[Burden of Proof, Wis JI-Civil 205]

COMMENT

This instruction and comment were first approved in 1972. They were revised in 2009.

As originally approved, the instruction stated that the intent necessary to commit an assault was either an intent to physically injure the plaintiff or an intent to put the plaintiff in fear that physical harm was to be committed upon the plaintiff. This element departed from Wisconsin case law having its origin in 1896 which held that an intent to physically harm was required to establish an assault. Degenhardt v. Heller, 93 Wis. 662, 68 N.W. 411 (1896). The holding in Degenhardt has been criticized. 1940 Wis. Law Review 103; 1955 Wis. Law Review 6. See also Prosser, Torts, p. 40-41; Restatement, Second, Torts, § 21, p. 37.

While the Committee believes intent to cause apprehension or fear should be sufficient to establish an intent, as it is in many states, Wisconsin case law supporting this position does not currently exist. Therefore, the Committee withdrew the original version of the assault instruction and replaced it with the version above which includes the requisite intent to cause physical harm as provided in Degenhardt.

For intentional infliction of emotional distress, see Wis JI-Civil 2725.

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2005 BATTERY: BODILY HARM

A battery occurred if:

1. (Defendant) intentionally caused bodily harm to (plaintiff); and

2. (Plaintiff) did not consent to the harm.

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

The requirement that (defendant) intended to cause bodily harm means that (defendant) had the mental purpose to cause bodily harm to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause bodily harm to (plaintiff) (or another person).

COMMENT

This instruction and comment were originally approved in 1977. The instruction was revised in 1994 and 2009. The comment was updated in 2010.

The definition of a battery is taken from Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), and McClusky v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1970). See also Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973).

When there has been a bodily contact, without injury except to the dignity and personal sensibilities of the person subjected to the battery, use Wis JI-Civil 2005.5.

See also Wis JI-Criminal 1220.

For a suggested verdict in a case involving an alleged battery by one tortfeasor and negligence by another tortfeasor, see JI-Civil 1580, Comment.

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2005.5 BATTERY: OFFENSIVE CONTACT

A battery occurred if:

1. (Defendant) intentionally caused offensive contact with (plaintiff); and

2. (Plaintiff) did not consent to the contact.

A contact is "offensive" if a reasonable person in (plaintiff)'s situation would have been offended by the contact. [An offensive contact is one that offends a reasonable sense of personal dignity.]

The requirement that (defendant) intended to cause offensive contact means that (defendant) had the mental purpose to cause offensive contact to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause offensive contact to (plaintiff) (or another person).

COMMENT

This instruction was originally approved in 1962 and numbered 2010. It was revised and renumbered Wis JI-Civil 2005.5 in 2010. The comment was updated in 2015.

In Voith v. Buser, 83 Wis.2d 540, 266 N.W.2d 304 (1978), the trial court, after the jury had deliberated for over an hour, reread the original instruction, dealing with bodily harm battery, Wisconsin Jury Instruction-Civil 2005. It then, for the first time, read an instruction involving an offensive bodily contact battery. The supreme court held that it was error to give the additional battery instruction, because the plaintiff's case was in no way based on the theory of offensive bodily contact, but rather on a theory of causing bodily harm.

For trial issues involving the element of consent (where the plaintiff was a child under sixteen) see Brekken v. Knopf, Appeal No. 2013AP1900 (per curiam) and Beul v. ASSE International, Inc., 233 F.3d 441 (7th Cir. 2000).

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2006 BATTERY: SELF-DEFENSE

(Defendant) claims that any injury to (plaintiff) was inflicted by (defendant) in self-defense.

"Self-defense" is the right to defend one's person by the use of whatever force is reasonably necessary under the circumstances.

If (defendant) reasonably believed that (his) (her) life was in danger or that (he) (she) was likely to suffer bodily harm, then (defendant) had a right to defend (himself) (herself) by the use of force as under the circumstances (he) (she) reasonably believed was necessary. (Defendant), who alleges that (he) (she) acted in self-defense, has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed that the use of some force was necessary to prevent injury and also that the amount of force used by (defendant) was reasonable under the circumstances.

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

In determining whether the force used by (defendant) was reasonably necessary, you may consider the actions of (plaintiff), the force or threat of force used by (plaintiff), the amount of force used by (defendant), the means or instrument by which the force was applied, as well as the relative strength and size of (plaintiff) and (defendant).

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If you determine that the (defendant) acted in self-defense, then you should answer "Yes" to Question No. _____, if you are required to answer that question.

SPECIAL VERDICT

Question No. 1.

Did (defendant) commit a battery on (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 1, then answer Question No. 2.

Question No. 2.

Was the battery a cause of (plaintiff)'s injuries?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 2, then answer Question No. 3.

Question No. 3.

Did (defendant) act in self-defense when (he) (she) struck (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

COMMENT

The instruction and comment were originally published in 1967. They were revised in 1994, 2010, 2011, and 2012. This instruction addresses the use of self-defense in cases not covered by Wis. Stat. § 895.62.

Privilege of Self-Defense. A defendant in a battery case can assert privilege as an affirmative defense. When the defendant's actions are privileged, "conduct which, under ordinary circumstances, would

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subject the actor to liability, under particular circumstances does not subject him to such liability." Restatement, Second, Torts § 10. This instruction deals with the privilege of self-defense, the most common example of privileged conduct asserted in a battery case.

See Maichle v. Jonovic, 69 Wis.2d 622, 230 N.W.2d 789 (1975), and Crotteau v. Karlgaard, 48 Wis.2d 245, 179 N.W.2d 797 (1970).

Use of more force than is reasonably necessary constitutes a battery to the extent of the force used in excess of the privilege. Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960); Palmer v. Smith, 147 Wis. 70, 77, 132 N.W. 614 (1911); Gutzman v. Clancy, 114 Wis. 589, 90 N.W. 1081 (1902); McConaghy v. McMullen, 27 Wis. 73, 79 (1870); Restatement, Second, Torts § 71 (1965).

In the case of children, beliefs, instincts, and impulses are judged in relation to those of a reasonable person of like age, intelligence, and experiences. The reasonableness of the actor's beliefs, moreover, is not defeated by a subsequent determination that the beliefs were mistaken. Maichle v. Jonovic, supra at 627-28.

Oral abuse is not sufficient to justify a battery. See Crotteau, supra at 250. However, there may be situations involving what the court in Maichle described as an "overt act of an ambiguous character." In these situations, self-defense is a justifiable defense in a civil action where the act gives rise to "a reasonable belief of imminent bodily harm when coupled with knowledge of previous threats of physical harm and dangerous propensities exhibited by the victim." Maichle, supra at 630.

This instruction needs to be tailored when the affirmative defense is based on the defense of a third party.

A defendant who is the initial aggressor can lose the right to claim self-defense unless the defendant abandons the fight and gives notice to his or her adversary that he or she has done so. Root v. Saul, 2006 WI App 106, 293 Wis.2d 364, 718 N.W.2d 197. See also Wis JI-Criminal 815.

Burden of Proof. The burden of proof to prove self-defense as a justification for injurious physical contact with another is on the defendant. See Rinehart v. Whitehead, 64 Wis. 42, 24 N.W. 401 (1885).

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2006.2 BATTERY: SELF-DEFENSE; DEFENDANT'S DWELLING, MOTOR VEHICLE, PLACE OF BUSINESS; WIS. STAT. § 895.62

This case involves an allegation of unlawful and forcible entry into a (dwelling) (motor vehicle) (place of business) and self-defense is an issue. The law of self-defense allows (defendant) to intentionally use force if (defendant) believed (his) (her) (or) (another's) life was in danger, or that (he) (she) (or) (another) was likely to suffer bodily harm.

(Defendant), who alleges that (he) (she) acted in self defense, has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed the use of force was necessary to prevent death or bodily harm.

A belief may be reasonable even though mistaken. In determining whether (defendant)'s beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in (defendant)'s position under the circumstances that existed at the time of the alleged offense. The reasonableness of (defendant)'s beliefs must be determined from the standpoint of (defendant) at the time of (his) (her) acts and not from the viewpoint of the jury now.

You may not consider whether (defendant) had an opportunity to flee or retreat before (he) (she) used force and (defendant) is presumed to have reasonably believed that the force was necessary to prevent imminent death or bodily harm to (himself) (herself) (or) (another person), if you find that:

- (Plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business);
- (Defendant) was present in the (dwelling) (motor vehicle) (place of business); and

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- (Defendant) knew or had reason to believe that an unlawful and forcible entry was occurring or had already occurred.

(NOTE: Insert a presumption instruction, Wis JI-Civil 350 or 352, adapted to the presumption created in Wis. Stat. § 895.62(3).)

[Alternative 1: Based on Wis JI-Civil 350:

There is a conflict in the evidence as to:

- Whether (plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business)(;)
- Whether (defendant) was present in the (dwelling) (motor vehicle) (place of business)(;) (and)
- Whether (defendant) (knew) (had reason to believe) that an unlawful and forcible entry was occurring.

If you find the existence of each of these facts more probable than not, then by law a presumption arises that (defendant) reasonably believed the force (defendant) used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person). But, there is also evidence from which you may conclude that (defendant)'s belief was not reasonable. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that the (defendant)'s belief was not reasonable, you must answer question _____ "yes."]

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[Alternative 2: Based on Wis JI-Civil 352:

There is no dispute in the evidence that:

- (Plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business)(;)
- (Defendant) was present in the (dwelling) (motor vehicle) (place of business)(;) (and)
- (Defendant) (knew) (had reason to believe) that an unlawful and forcible entry was occurring.

From these facts, a presumption arises that (defendant) reasonably believed the force (defendant) used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person). But, there is evidence in the case which may be believed by you that (defendant)'s belief was not reasonable. You must resolve this conflict.

Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (defendant) did not reasonably believe the force used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person), you must answer question ____ "yes."]

SPECIAL VERDICT

Question No. 1.

Did (defendant) commit a battery on (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 1, then answer Question No. 2.

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Question No. 2.

Was the battery a cause of (plaintiff's) injuries?

Answer: _____
Yes or No

If you answered "Yes" to Question No. 2, then answer Question No. 3.

Question No. 3.

Did (defendant) act in self-defense when (he) (she) [e.g. struck] (plaintiff) on [date of alleged battery]?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 2012. The word "not" was inadvertently omitted in the 2012 version from the last sentence of paragraph 3. This omission was corrected in 2015. The defense, created by Wis. Stat. § 895.62, refers to what is commonly termed the "Castle Doctrine." See also Wis JI-Criminal 805. The comment was updated in 2015.

On December 21, 2011, 2011 Wisconsin Act 94 became effective. It applies to a use of force that occurs on or after December 21, 2011. Act 94 creates Wis. Stat. § 895.62. It establishes a presumption of immunity in civil actions involving force that is intended or likely to cause death or great bodily harm if an actor reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person and either item 1. or 2., below, applies. A person is presumed to have reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person if either of the following applies:

1. The person against whom the force was used was unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business; the actor was on his or her property or present in the dwelling, motor vehicle, or place of business; and the actor knew or had reason to believe that an unlawful and forcible entry was occurring.

2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; the actor was present in the dwelling, motor vehicle, or place of business; and the actor knew or had reason to believe that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The presumption does not apply if: (a) the actor was engaged in criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time he or she used force; or (b) the person against whom the force was used was a public safety worker who entered or

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attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties if the public safety worker identified himself or herself to the actor before force was used by the actor or the actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

The new law also provides that if either of the circumstances described above in paragraph 1 or 2 applies, the fact finder may not consider whether the actor had an opportunity to flee or retreat before he or she used force.

Presumption. It is not clear whether the presumption set out in Wis. Stat. § 895.62(3) is rebuttable; or whether read in conjunction with the presumption in Wis. Stat. § 939.48(1m)(ar), is not. The committee believes the more prudent course is to follow well-established law as to presumptions, and therefore recommends giving Wis JI-Civil 350 or 352, which would shift the burden of proof to the party seeking to overcome the presumption. The committee agrees that another reading of the statute would render the presumption conclusive, not subject to rebuttal. There is no logical way to harmonize these two views, and this is our recommendation until further guidance on this issue is received from the appellate courts or the legislature. The statutory presumption in Wis. Stat. § 895.62(3) does not apply if (1) the defendant was engaged in criminal activity or using his or her property to further a criminal activity or (2) the plaintiff was a public safety worker who identified himself or herself or who the defendant knew or reasonably should have known was a public safety worker. Wis. Stat. § 895.62(4).

Definition of Dwelling. The civil "Castle Doctrine" statute (Wis. Stat. § 895.62) incorporates the following definition of "dwelling" given in Wis. Stat. § 895.07(1)(h):

> "Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements.

In a criminal case, the Court of Appeals held that the defendant was not entitled to an instruction under the criminal "Castle Doctrine" statute (Wis. Stat. § 939.48(1m)) because the defendant fired a gun at persons who were fleeing from the defendant's apartment building through a parking lot and were not in the defendant's "dwelling." State v. Chew, Appeal No. 2013AP2592 (recommended for publication). The court noted that "dwelling" is defined in Wis. Stat. § 895.07(1)(h).

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2006.5 BATTERY: DEFENSE OF PROPERTY

(Defendant) claims that any injury (plaintiff) sustained was inflicted by (defendant) in defense of (his) (her) property.

(Defendant) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed that some force was necessary to prevent an interference with (his) (her) property.

(Defendant) further has the same burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the amount of force used was no more than a person of ordinary intelligence and prudence would have believed necessary under the same or similar circumstances.

A "reasonable belief" is the belief a person of ordinary intelligence and prudence would have under the circumstances confronting the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The fact that (defendant)'s belief may have been in error does not make (his) (her) conduct wrongful if a person of ordinary intelligence and prudence would have the same belief under the same or similar circumstances.

It is not reasonable to use force intended or likely to cause death or great bodily harm in defending one's property. "Great bodily harm" means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

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If you find that (defendant) reasonably believed some force was necessary to defend (his) (her) property and that the force used was reasonable, then you should find that there was no battery.

COMMENT

This instruction was approved by the Committee in 1995. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 2011 and 2012.

See Oleson v. Fader, 160 Wis. 473, 152 N.W. 290 (1915); Wis JI-Criminal 855 and 860. See also Wis. Stat. § 895.529(3)(a) (created by 2011 Wisconsin Act 93) and the commentary to Wis JI-Civil 2006.2 for a discussion of self-defense.

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2007 BATTERY: LIABILITY OF AN AIDER AND ABETTOR

Question ___ asks whether (defendant) participated in a battery to _____.

A person may participate in a battery even though he or she does not physically attack the victim. A person participates in a battery if the person:

1. knowingly renders assistance to the person(s) committing the battery, or
2. indicates a readiness or willingness to join in the battery and the person(s) committing the battery knows of his or her willingness, or
3. is present at the scene of the battery and intentionally incites another person to unlawfully attack another person. The word "incite" means to move another person to action, to spur him or her on, or persuade him or her to commit the battery.

A person who is present at the time and place of a battery but does not make an act, word, or gesture to aid or encourage the physical attack is not deemed to have participated in the battery even though the person did nothing to prevent or stop the attack.

COMMENT

This instruction and comment were originally approved in 1966 and were revised in 1986 and 2010.

See Krudwig v. Kaepke, 227 Wis. 1, 277 N.W. 670 (1938); Krudwig v. Kaepke, 223 Wis. 244, 270 N.W.2d 79 (1936); Fredrickson v. Kabat, 266 Wis. 442, 63 N.W.2d 756 (1954); Rinehart v. Whitehead, 64 Wis. 42, 46, 24 N.W. 401 (1885); Hilmes v. Stroebel, 59 Wis. 74, 75, 17 N.W. 539 (1883); 6 Am. Jur.2d Assault and Battery § 128 (1963).

For one to incite another to commit a battery, it is necessary that he or she be present at the scene of the action. Krudwig v. Kaepke, 227 Wis. 1, 277 N.W.2d 670 (1938).

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"To 'incite' one, that is move him to action, spur him on, or persuade him to action, as to commit an assault, the person inciting him must be present at the scene of the action and not merely directing, ordering, or procuring such action." Krudwig, 227 Wis. at 5.

In Winslow v. Brown, 125 Wis.2d 327, 336, 371 N.W.2d 417 (Ct. App. 1985), the court concluded that a person is liable for aiding and abetting if: (1) the person undertakes conduct that as a matter of objective fact aids another in the commission of an unlawful act; and (2) the person consciously desires or intends that the conduct will yield such assistance. The court of appeals also held that liability premised on aiding and abetting in the civil context is not limited to intentional conduct but also extends to negligent torts as well.

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2008 BATTERY: EXCESSIVE FORCE IN ARREST

Question ___ asks you to determine whether (defendant) used excessive force in arresting (plaintiff). It is admitted that (defendant) made contact with (plaintiff) and used force at the time of making the arrest, which force, if not reasonable under the circumstances, would constitute a battery.

As a law enforcement officer, (defendant) had the duty to enforce the laws of Wisconsin and in making an arrest may use reasonable force to overcome the resistance of the person being arrested. This force, however, must not be excessive; that is, the officer must not use more force than is reasonably necessary under all of the circumstances.

The fact that the evidence in this case shows physical contact between (defendant) and (plaintiff), which resulted in injury to (plaintiff), is not proof that (defendant) used excessive force.

(Defendant) had the lawful authority to use such force in making the arrest as a reasonable police officer would believe to be necessary. But the use of force beyond that which a reasonable police officer would believe necessary under all the circumstances then existing is excessive force.

The fact that (defendant) believed (plaintiff) was guilty of a crime is irrelevant. Persons being arrested have a right not to be mistreated by the use of excessive force.

[Give middle burden instruction, Wis JI-Civil 205.]

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COMMENT

The instruction and comment were approved by the Committee in 1981. A parenthetical reference to the burden of proof instruction was corrected in 2001. The comment was revised in 1998 and 2001.

Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981); Wirsing v. Krzeminski, 61 Wis.2d 513, 213 N.W.2d 37 (1973); McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1970). See also Wis JI-Civil 2155.

In Wirsing, the court specifically recognized that a police officer's liabilities for a battery are founded on legal and policy considerations that are distinguishable from those in an ordinary battery case. The court stated that the general principle applicable to police officers making arrests is found in Restatement, Second, Torts § 118:

> The use of force against another for the purpose of effecting his arrest . . . [is] privileged if all the conditions stated in secs. 119-132 . . . exist.

The principal condition to the above Restatement provision is that an actor may not use force in excess of what the actor believes to be necessary. Restatement, Second, Torts § 132.

In Wirsing, the court stated that the trial court's instructions placing emphasis upon the special privilege of a police officer were correct and that they "reflected . . . the legal entitlement conferred by law upon a police officer to use necessary force." Wirsing, supra at 521. Where the relevant facts that emerge at trial are primarily concerned with the issue of excessive force, an instruction on self-defense is not necessary.

The burden upon the plaintiff to establish excessive force is the middle burden. Johnson, supra at 783. A plaintiff is entitled to be awarded compensation only for injuries and resulting damages caused by the use of excessive force by the police. Johnson, supra at 786.

Intentional Tort. In Kofler v. Florence, 216 Wis.2d 41, 573 N.W.2d 568 (Ct. App. 1997), the court said excessive force in arrest is an intentional tort. The plaintiff argued that despite its title, "battery: excessive force in arrest," the pattern jury instruction, Wis JI-Civil 2008, does not involve an intentional tort because there is no requirement for a finding that the defendant had the requisite mental intent for civil battery. The court of appeals disagreed. It said that the jury instruction is premised on the fact that the officer did commit a civil battery and that the further requirement under the instruction that the use of force must be reasonable does not change the tort to one in negligence. It is merely a limitation on the amount of force a police officer may use under his or her limited privilege to engage in civil battery.

Need for Expert Testimony. The Wisconsin Supreme Court has concluded that determinations of excessive use of force are not, in general, beyond the realm of ordinary experience and lay comprehension. It rejected a categorical requirement of expert testimony in excessive use of force cases. Robinson v. City of West Allis, 2000 WI 126, 239 Wis.2d 595, 619 N.W.2d 692.

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2010 ASSAULT AND BATTERY: OFFENSIVE BODILY CONTACT

[Instruction Renumbered JI-Civil 2005.5]

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2020 SPORTS INJURY: RECKLESS OR INTENTIONAL MISCONDUCT

A participant in a (recreational) (amateur) (professional) athletic activity that includes physical contact is liable for injury caused to another participant during the activity if the participant who caused the injury acted recklessly or with intent to cause injury.

[A participant acts with intent to cause injury if (he) (she) engages in conduct with the intent to cause injury by that conduct. An intent to cause injury exists where the participant either means to cause injury by (his) (her) conduct or where an injury is almost certain to follow from this conduct.]

[A participant acts recklessly if (his) (her) conduct is in reckless disregard of the safety of another. It occurs where a participant engages in conduct under circumstances in which (he) (she) knows or a reasonable person under the same circumstances would know that the conduct creates a high risk of physical harm to another and (he) (she) proceeds in conscious disregard of or indifference to that risk. Conduct which creates a high risk of physical harm to another is substantially greater than negligent conduct. Mere inadvertence or lack of skill is not reckless conduct.]

In considering the conduct involved in this case, you should consider the sport involved; the rules, regulations, customs and practices governing the sport, including the types of contact and the level of violence generally accepted; the risks inherent in the game and those that are outside the realm of anticipation; and the protective equipment worn. You should also consider the age and physical attributes of the participants and their respective skills and knowledge of the rules and customs of the game.

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[If you find that (defendant) engaged in conduct and intended to cause injury by that conduct, however great or small, or that (defendant)'s conduct was almost certain to cause injury in some way, however great or small, then (defendant) acted with intent to injure.]

[If you find that (defendant) engaged in conduct which (he) (she) knew or a reasonable person under the same circumstance would know created a high risk of physical harm to another, and (he) (she) proceeded anyway, then (defendant) acted recklessly.]

COMMENT

This instruction and comment were approved in 1997. The comment was updated in 2006 and 2018.

The instruction is based on Wis. Stat. § 895.525(4m) which codified the theory espoused by the dissent in Lestina v. West Bend Mut. Ins. Co., 176 Wis.2d 901, 501 N.W.2d 28 (1993). The statute reads:

> **(4m)** LIABILITY OF CONTACT SPORTS PARTICIPANTS. (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.
>
> (b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

The Wisconsin Supreme Court has cited the language of paragraph 3 of this section with approval. See Noffke v. Bakke, 315 Wis. 2d 350, ¶ 36 (2009).

Paragraph four is taken from the majority opinion in Lestina. Although these considerations were intended to aid the fact-finder in defining actionable ordinary negligence in a sports injury context, the Committee thought they would be helpful in either intentional or reckless sports injury cases, as well.

For a case involving a sports-related injury, see Shain v. Racine Raiders Football Club, Inc., 2006 WI App 257, 297 Wis.2d 869, 726 N.W.2d 346.

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2100 FALSE IMPRISONMENT

Question _____ asks: Did (Defendant) falsely imprison (Plaintiff) on _____?

False imprisonment is the unlawful restraint by one person of the physical liberty of another person. Before you may find that (Defendant) falsely imprisoned (Plaintiff), you must find the following:

1. (Defendant) confined or restrained (Plaintiff).

   Although this requires actual restraint or confinement, it does not require that it be in a jail or prison. If (Defendant) deprived (Plaintiff) of freedom of movement, or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (Plaintiff) was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both;

2. (Defendant) confined or restrained (Plaintiff) intentionally.

   This means that (Defendant) acted with purpose to confine or restrain (Plaintiff) or knew that the confinement or restraint would be substantially certain;

3. (Defendant) did not have lawful authority to confine or restrain (Plaintiff); and

4. (Plaintiff) was confined or restrained without (his) (her) consent.

COMMENT

This instruction and comment were approved in 1974 and revised in 2014.

The essence of false imprisonment is the intentional, unlawful, and unconsented restraint by one person of the physical liberty of another. Herbst v. Wuennenberg, 83 Wis.2d 768, 266 N.W.2d 391 (1978).

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False imprisonment defined: intent an element, Strong v. Milwaukee, 38 Wis.2d 564, 157 N.W.2d 619 (1968) (this case refers to Wis JI-Civil 2100).

Unlawful restraint, Weber v. Young, 250 Wis. 307, 311, 26 N.W.2d 543 (1947); Maniaci v. Marquette University, 50 Wis.2d 287, 184 N.W.2d 168 (1971).

False imprisonment against officer: Where the writ is defective on its face or beyond the jurisdiction of the officer issuing process, the officer serving process is not protected. The officer serving process is bound to know what the law is. Rubin v. Schrank, 207 Wis. 375, 378, 241 N.W. 370 (1932). Lueck v. Heisler and another, 87 Wis. 644, 646, 58 N.W. 1101 (1894).

Citizen's arrest (department store floor walker): Cobb v. Simon, 119 Wis. 597, 97 N.W. 276 (1903).

Unlawful imprisonment where no force or violence is actually used: Gunderson v. Struebing, 125 Wis. 173, 177, 104 N.W. 149 (1905).

False imprisonment may not be predicated upon a person's unfounded belief that he or she was restrained. Herbst v. Wuennenberg, supra.

For burden of proof, see Bursack v. Davis, 199 Wis. 115, 225 N.W. 738 (1929).

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2110 FALSE IMPRISONMENT: COMPENSATORY DAMAGES

No instruction.

COMMENT

This instruction was withdrawn in 2013. The Committee believes that the instructions on general compensatory damages adequately cover claims for false imprisonment.

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2115 FALSE ARREST; LAW ENFORCEMENT OFFICER; WITHOUT WARRANT

[Define the crime involved in the arrest.]

An arrest is the seizing or detaining of a person by any act or words which indicate an intention to take the person into custody, thereby causing the person arrested to believe that he or she is under the actual control and will of the person making the arrest. No formal declaration of arrest is required.

An arrest may be made without a warrant if the law enforcement officer has reasonable grounds to believe that (a warrant for the arrest has been issued in this state) (a felony warrant for the arrest has been issued in another state) (the person is committing or has committed a crime).

Reasonable grounds to believe means that amount of evidence or information which would lead a reasonable police officer to believe that (a warrant for the arrest has been issued in this state) (a felony warrant for the arrest has been issued in another state) (the person is committing or has committed a crime).

In determining reasonable grounds, the officer may take into account all facts, including his or her own observations, and information the office believes are dependable, even if received from others. Information received from others must be corroborated or received under circumstances which make it reasonable to rely on that information. If the arrest is made solely on the basis of information received from an informant, the officer must have independent knowledge of the reliability of the informant or else the information must be received under circumstances which make it reasonable to rely on that information, even though the officer may not know the informant's identity. The reasonableness of the grounds does not depend upon the outcome of the subsequent legal investigation or prosecution resulting from the arrest.

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The facts and circumstances within the officer's knowledge, and of which the officer had reasonably trustworthy information at the time of the arrest, must be sufficient in themselves to warrant a police officer of reasonable caution to believe that (a warrant for the arrest has been issued in this state) (a felony warrant for the arrest has been issued in another state) (the person is committing or has committed a crime).

COMMENT

This instruction and comment were approved in 1977. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Wis. Stat. § 968.07 Arrest by law enforcement officer.

Central idea of arrest: control of liberty: Huebner v. State, 33 Wis.2d 505, 147 N.W.2d 646 (1967).

Arrest may be made without a warrant for any crime committed in the officer's presence. State v. Smith, 50 Wis.2d 460, 184 N.W.2d 889 (1971).

Probable cause defined: State v. Herrington, 41 Wis.2d 757, 165 N.W.2d 120 (1969). "Probable cause" is a requirement of the fourth amendment of the United States Constitution, binding upon the states through the fourteenth amendment. Section 11, Article 1 of the Wisconsin Constitution is substantially like the fourth amendment of the United States Constitution. Browne v. State, 24 Wis.2d 491, 129 N.W.2d 175, 131 N.W.2d 169 (1965).

"Probable cause," "reasonable cause," and "reasonable grounds" are concepts having the same meaning. Kluck v. State, 37 Wis.2d 378, 155 N.W.2d 26 (1967); United States v. Walker, 246 F.2d 519, 526 (7th Cir. 1957); United States v. Vasquez, 183 F. Supp. 190, 193 (E.D. N.Y. 1960); Draper v. United States, 358 U.S. 307 (1959).

As to what constitutes reasonable grounds, see State v. Camara, 28 Wis.2d 365, 373, 137 N.W.2d 1 (1965); Browne v. State, 24 Wis.2d 491, 503, 129 N.W.2d 175, 131 N.W.2d 169 (1965); Stelloh v. Liban, 21 Wis.2d 119, 125, 124 N.W.2d 101 (1963); Henry v. United States, 361 U.S. 98, 102 (1959).

As to the adequacy of evidence based on information received from others see State v. Camara, supra at 374; Browne v. State, supra at 506; Stelloh v. Liban, supra; Draper v. United States, supra.

The reasonableness of the grounds does not depend upon the outcome of the subsequent legal investigation. Stelloh v. Liban, supra at 125; Carson v. Pape, 15 Wis.2d 300, 308, 112 N.W.2d 693 (1961).

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2150 FEDERAL CIVIL RIGHTS: §§ 1981 & 1982 ACTIONS

(Plaintiff) has alleged that (defendant) has deprived (him) (her) of a federal civil right by discriminating against (him) (her) (in renting an apartment) (in purchasing a home) (making the contract in issue). The federal law states:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . (42 U.S. Code § 1981)
>
> All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property. (42 U.S. Code § 1982)

Before you can answer question 1 "yes," you must find the following:

First, that (plaintiff), attempted (or offered) to lease an apartment as described in the evidence from (defendant) and was ready, willing and able to pay (defendant)'s rental price.

Second, that (defendant) refused to lease to (plaintiff), or to negotiate for the rental of or otherwise made unavailable, or discouraged or denied (plaintiff) an apartment.

Third, that race was a substantial factor actually operating as a basis for (defendant)'s conduct even if not the sole basis for (defendant)'s refusal to lease.

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COMMENT

This instruction and comment were originally approved by the Committee in 1983. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Section 1981 applies also to discrimination based upon ethnic affiliation, national origin, or alienage as well as race. Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974); Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979).

The U.S. Supreme Court has declared that Section 1982 prohibits both public and private acts of racial discrimination in the sale of or rental of housing. Memphis v. Greene, 451 U.S. 100 (1981); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Instances of unlawful discrimination in housing transactions may also be remedied by applying the provisions of the Fair Housing Act of 1968 (Title VIII), 42 U.S.C. § 3601, et seq. A claim under § 1982 is independent from a claim based on the Fair Housing Act. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The coverage of the Fair Housing Act is more limited than § 1982 in that Title VIII does not cover the sale or rental of a single-family house by the owner if the owner does not own more than three such houses at one time, sells or rents without the use of a real estate broker, and does not advertise in violation of the Act.

This instruction is derived from Sandford v. R. L. Coleman Realty Co., 573 F.2d 173 (4th Cir. 1978).

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2151 FEDERAL CIVIL RIGHTS: § 1983 ACTIONS

Instruction Withdrawn.

COMMENT

This instruction was approved by the Committee in 1987 and withdrawn in 2014. For federal civil rights jury instructions prepared by the Committee on Pattern Jury Instructions of the U.S. Court of Appeals for the Seventh Circuit, visit www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf

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2155 FEDERAL CIVIL RIGHTS: EXCESSIVE FORCE IN ARREST (IN MAINTAINING JAIL SECURITY)

Instruction Withdrawn.

COMMENT

The instruction was approved by the Committee in 1980 and withdrawn in 2014. For federal civil rights jury instructions prepared by the Committee on Pattern Jury Instructions of the U.S. Court of Appeals for the Seventh Circuit, visit www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf

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2200 CONVERSION: DISPOSSESSION

A conversion is committed by a person who without consent of the owner (controls) (takes) property of another in a way that it seriously interferes with the right of the owner to control the property permanently or for an indefinite period of time. Before you may find that (defendant) committed a conversion of property belonging to (owner), you must find the following:

1. That (defendant) intentionally (controlled) (took) property belonging to (owner);
2. That (defendant) (controlled) (took) the property without the consent of (owner) or without lawful authority; and
3. That (defendant)'s act with respect to the property seriously interfered with the right of (owner) to possess the property.

Wrongful or unlawful intent is not an element of conversion. Thus, it is not necessary that (defendant) knew that (owner) was entitled to possession of the property or that (defendant) intended to interfere with (owner)'s possession. It is simply enough that (defendant) intended to deal with the property in a way that would seriously interfere with (owner)'s possession. Thus, a person may be liable for conversion where the person has exercised control over property even though he or she may be unaware of the existence of the rights with which he or she interferes.

COMMENT

This instruction and comment were originally approved in 1963 and revised in 1986. The instruction was revised in 1991. The comment was updated in 1995, 1999, 2009, and 2014.

Midwestern Helicopter v. Coolbaugh, 2013 WI App 126, 351 Wis.2d 211, 839 N.W.2d 167; H.A. Friend & Co. v. Professional Stationery, Inc., 2006 WI App 141, 294 Wis.2d 754, 720 N.W.2d 96. Production Credit Ass'n v. Nowatzski, 90 Wis.2d 344, 353, 280 N.W.2d 18 (1979); Production Credit Ass'n v. Equity

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Coop. Livestock, 82 Wis.2d 5, 10, 261 N.W.2d 127 (1977); Price v. Ross, 62 Wis.2d 335, 346, 214 N.W.2d 770 (1974); Schara v. Thiede, 58 Wis.2d 489, 497, 206 N.W.2d 129 (1974); Heuer v. Wiese, 265 Wis. 6, 60 N.W. 2d 385 (1953); Adams v. Maxcy, 214 Wis. 240, 252 N.W. 598 (1934); Farm Credit Bank of St. Paul v. F&A Dairy, 165 Wis.2d 360, 477, Wis.2d 357 (Ct. App. 1991); Methodist Manor Health Center, Inc. v. Py, 2008 WI App 31, 307 Wis.2d 501, 746 N.W.2d 824. See also Bruner v. Heritage Co., 225 Wis.2d 728, 593 N.W.2d 814 (Ct. App. 1999). Prosser, Torts, § 15 (1971). See also Restatements, Second, Torts §§ 222-242 (1965).

Types of Conversion. Acts of conversion are ordinarily classified as: (1) a taking from the owner without his or her consent; (2) an unwarranted assumption of ownership; (3) an illegal use or abuse of the property; (4) a wrongful detention after demand. Donovan v. Barkhausen Oil Co., 200 Wis. 194, 198, 227 N.W. 940 (1929).

Conversion is an intentional interference with another person's rights to possession of property. The intent required is not necessarily a matter of conscious wrongdoing. Wrongful intent or bad faith are not essential elements of conversion. Donovan v. Barkhausen Oil Co., supra at 199. Regas v. Helios, 176 Wis. 56, 186 N.W. 165 (1922). Conversion cannot be based on a negligent interference with the property. Lund v. Keller, 203 Wis. 458, 233 N.W. 769 (1931). It requires some intentional dominion or control over property which is inconsistent with the owner's rights. Prosser, Torts, § 15, p. 83 (1971). Thus, every theft is a conversion, but not every conversion is a theft.

Verdict Form. If there is a dispute in the evidence as to whether the plaintiff was entitled to possession at the time of conversion, a special verdict question should be included dealing with the plaintiff's possessory interest.

A conversion may consist of an assumption of complete control and dominion over the property without an actual taking or carrying away. Thus, a cause of action for conversion can include illegally withholding personal property by changing locks to the building in which the property was stored. Schara v. Thiede, supra at 497.

An agent may be liable for conversion if the principal engaged in the wrongful activity. The agent's good faith and lack of knowledge of a security on the property are not good defenses. Production Credit Ass'n v. Equity Coop. Livestock, supra at 8-9. Thus, an auctioneer may be held liable for the sale of personal property in which another holds a security interest. For another decision on the transfer of property subject to a security interest see Metropolitan Sav.& Loan Ass'n v. Zuelke's, Inc., 46 Wis.2d 568, 175 N.W.2d 634 (1970).

Conspiracy to Convert. For a civil conspiracy to convert, see Bruner v. Heritage Co., supra.

Causation. There is no causation element in conversion; the conversion must result in interference with the owner's rights to possess the property. Midwestern Helicopter v. Coolbaugh, supra; H.A. Friend & Co. v. Professional Stationery, Inc., supra.

Whether an unauthorized exercise of dominion is a conversion depends on the severity of interference with the owner's right to control. Midwestern Helicopter v. Coolbaugh, supra.

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2200.1 CONVERSION: REFUSAL TO RETURN UPON DEMAND (REFUSAL BY BAILEE)

A conversion is committed by a person who, without justification, refuses to surrender possession of property to one who is entitled to it. Before you may find that (defendant) committed a conversion of the property belonging to (owner), (plaintiff) must establish:

1. that (defendant), who had lawfully come into possession of the property, refused to surrender it to (owner) after (owner) demanded that the property be returned;
2. that (owner) was entitled to the return of the property; and
3. that the withholding of the property by (defendant) seriously interfered with the right of (owner) to control and use the property.

A refusal by a person to return the property because of a legitimate reason and for a reasonable length of time after demand is not a conversion. In addition, a person is not required to comply with a demand made at an unreasonable time or place, or in an unreasonable manner, or upon an employee who has no authority to return the property. [In addition, a person may in good faith detain property for a reasonable time to identify (owner) or to determine (owner)'s right to possession.]

COMMENT

This instruction was approved in 1986. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Price v. Ross, 62 Wis.2d 335, 346, 214 N.W.2d 770 (1974); Donovan v. Barkhausen Oil Co., 200 Wis. 194, 198, 227 N.W. 940 (1929). Restatements, Second, Torts §§ 237-40 (1965). Prosser, Torts 4th Ed., § 15, p. 90-91 (1971).

See also Comment to Wis JI-Civil 2200.

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2200.2 CONVERSION: DESTRUCTION OR ABUSE OF PROPERTY

A conversion is committed by a person who without consent of the owner seriously interferes with the right of the owner of property to control his or her property permanently or for an indefinite period of time. Before you may find that (defendant) committed a conversion of the property belonging to (owner), you must find the following:

1. that (defendant) intentionally (destroyed property belonging to (owner)) (abused or materially altered property belonging to (owner)) to such an extent as to change its identity or character;
2. that (defendant) (destroyed) (abused or materially altered) the property without the consent of (owner); and
3. that the (destruction) (abuse or material alteration) of the property seriously interfered with the right of (owner) to control and use the property.

Wrongful or unlawful intent is not an element of conversion. Thus, it is not necessary that (defendant) knew that (owner) was entitled to possession of the property or that (defendant) intended to interfere with (owner)'s possession of the property. It is simply enough that (defendant) intended to deal with the property in a way that would seriously interfere with (owner)'s possession of the property. Thus, a person may be liable for conversion by exercising control over property even though the person may be unaware of the rights with which the person interferes.

An act which is not intended to exercise any control over property but is merely negligent with respect to it is not a conversion, even though it may result in the loss of the property.

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COMMENT

This instruction was approved in 1986 and revised in 1991.

Donovan v. Barkhausen Oil Co., 200 Wis. 194, 198, 227 N.W. 940 (1929); Restatement, Second, Torts § 226 (1965); Prosser, Torts, 4th Ed., p. 91. See also Comment, Wis JI-Civil 2200.

This instruction does not apply to situations in which the claim is based on negligence.

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2201 CONVERSION: DAMAGES

In determining what sum of money will reasonably compensate (plaintiff) for the conversion of (his) (her) property by (defendant), you must first determine the manner in which (defendant) came into possession of the (insert description of plaintiff's property).

[If (defendant) rightfully came into possession of the property, but later was unable or refused to return it upon demand, then you are to award (plaintiff), as damages, the value of the property on the date when the property should have been returned to (plaintiff) with interest to the time of trial.]

[If (defendant) wrongfully took (or converted) (plaintiff)'s property, then you are to award (plaintiff), as damages, the value of the property at the time (and place) of the wrongful taking with interest to the time of trial.]

[If (defendant) wrongfully took (plaintiff)'s property and later sold it, (plaintiff) may recover, as damages, the amount for which the property was sold or the value at the time (and place) of the wrongful taking, whichever is greater with interest to the time of trial.]

[If the property wrongfully taken (or converted) is still in the possession of (defendant), but (defendant) refuses to return it to (plaintiff), then (plaintiff) may recover the present value of the property at the place where the property was taken (or converted) in the condition it was when taken (or converted) with interest to the time of trial.]

COMMENT

This instruction and comment were approved in 1982 and revised in 1991, 2014, and 2016.

Production Credit Association v. Nowatzski, 90 Wis.2d 344, 280 N.W.2d 118 (1979); Ingram v. Rankin, 47 Wis. 406 at 420 (1879); Topzant v. Koshe, 242 Wis. 585 (1943); also see 18 Am. Jur.2d Conversion §§ 82-94 (1965).

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Damages and Pre-Judgment Interest. The general rule regarding damages for conversion is that "the plaintiff may recover the value of the property at the time of the conversion plus interest to the date of the trial." Topzant, 242 Wis. at 588; Metropolitan Sav. & Loan Association v. Zuelke's, Inc., 46 Wis.2d 568, 577, 175 N.W.2d 64 (1970); Midwestern Helicopter, LLC v. Coolbaugh, 2013 WI App 126 at ¶ 9, 351 Wis.2d 211, 839 N.W.2d 167.

Additional Damages. The two cases cited above (Ingram v. Rankin, supra; and Topzant v. Koshe, supra) are also authority for the proposition that while the general rule limits plaintiff's recovery to the value of the property converted (whether it be at the time of the original taking or sale of the property by the converter), the plaintiff may recover additional damages if the plaintiff is deprived of some special use of the property which should be anticipated by the converter. Recovery of this additional damage requires a showing that the special use would have resulted in the plaintiff realizing some benefit from the property had it not been converted. Exemplary or punitive damages also may be awarded in addition to actual damages if the evidence is of such a character as to warrant the submission of punitive damages to the jury.

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LAW NOTE FOR TRIAL JUDGES

2400 MISREPRESENTATION: BASES FOR LIABILITY AND DAMAGES

Wisconsin recognizes three common law categories of misrepresentation: intentional, strict responsibility, and negligent misrepresentation. All three require that the defendant made an untrue representation of fact and that the plaintiff relied upon the representation. Intentional misrepresentation additionally requires that the defendant knowingly or recklessly made the untrue representation with the intent to deceive the plaintiff. Strict responsibility misrepresentation does not require a showing of an intent to deceive, rather the plaintiff must only show that the defendant had an economic interest in the transaction and made the representation on the defendant's personal knowledge under circumstances in which the defendant necessarily ought to have known the truth or untruth of the statement.[1] Negligent misrepresentation differs from intentional and strict responsibility misrepresentation in the circumstances and quality of the representation of fact. Under negligent misrepresentation, the untrue statement of fact need only be "negligently" made rather than intentional and the speaker does not require an economic interest in making the representation.

Intentional Misrepresentation

The elements of intentional misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation either knowing that it was untrue, or recklessly not caring whether it was true or false; (4) the defendant made the representation with the intent to deceive the plaintiff in order to induce the plaintiff to act to plaintiff's pecuniary damage; and (5) the plaintiff

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believed that the representation was true and relied on it.[2] The plaintiff's reliance on the representation must be justifiable.[3]

Strict Responsibility Misrepresentation

The elements of strict responsibility misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his or her personal knowledge, or was so situated that he or she necessarily ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed that the representation was true and relied on it.[4] The plaintiff's reliance on the representation must be justifiable.[5]

Strict responsibility applies to those situations where public opinion calls for placing the loss on the innocent defendant rather than on the innocent plaintiff and requires the presence of two factors before liability may be found: (1) "a representation made as of defendant's own knowledge, concerning a matter about which he or she purports to have knowledge, so that he or she may be taken to have assumed responsibility as in the case of warranty, and (2) a defendant with an economic interest in the transaction into which the plaintiff enters so that defendant expects to gain some economic benefit."[6] The policy behind strict responsibility misrepresentation is that the speaker should know the pertinent facts of which he or she is speaking or else the speaker should not speak.[7]

The doctrine of strict responsibility misrepresentation has primarily been utilized in cases involving property transactions,[8] such as where there has been a representation as to the identification, boundaries, quantity and quality of the land, and existence of certain improvements upon the land, all of which were untrue. As discussed below, the creation of

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the economic loss doctrine (ELD) in 1989 has greatly impacted common-law claims involving property transactions.

Negligent Misrepresentation

The elements of negligent misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant was negligent in making the representation; and (4) the plaintiff believed that the representation was true and relied on it.[9] Negligence for misrepresentation, like other actions for negligence, requires a duty of care, or a voluntary assumption of duty.

Measurement of Damages

Wisconsin has adopted the "benefit-of-the-bargain" measure of damages for intentional[10] and strict responsibility[11] claims. The "benefit-of-the-bargain" gives the difference between the fair market value of the property in the condition when purchased and the fair market value of the property as it was represented.[12] The "out-of-pocket" rule, which gives the difference between what the plaintiff gave as consideration and what the plaintiff actually received, is utilized in cases of negligent misrepresentation.[13]

Economic Loss Doctrine

The ELD was judicially created in 1989[14] to preserve the distinction between tort and contract law and requires transacting parties in Wisconsin to pursue only their contractual remedies when asserting an economic loss claim.[15] The ELD was designed to protect the freedom to allocate economic risk by contract and to encourage the party best situated to assess the risk of economic loss (the purchaser) to assume, allocate, or insure against that

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risk.[16] In 1999, the ELD barred negligence and strict liability claims arising in the context of consumer goods transactions.[17]

In 2003, the Supreme Court formally adopted a "narrow" exception to the ELD to promote "honesty, good faith and fair dealing during contract negotiations."[18] The "fraud in the inducement" exception was created to apply when an intentional misrepresentation occurred before the formation of the contract and the plaintiff is able to prove all five elements of intentional misrepresentation by "clear, satisfactory, and convincing evidence."[19]

Five years later, the Supreme Court further restricted the ability to prove an intentional misrepresentation claim in Below v. Norton.[20] Below involved a home purchase in which the buyer alleged that the seller intentionally failed to disclose that the sewer pipe running to the house was defective. Below sued under theories of intentional, strict responsibility, and negligent misrepresentation. The circuit court dismissed these common-law claims on the ground that the ELD barred recovery.[21]

The principal issue in Below was whether the ELD bars common-law claims for intentional misrepresentation that occur "in the context of residential, or noncommercial, real estate transactions."[22] Below argued that the ELD should apply only in "a commercial context," and that the "fraud in the inducement exception" should apply.[23] The Below court found that whether a buyer is a "commercial" or a "residential" buyer is not determinative in ELD analysis[24] and that in order for a "fraud in the inducement" exception to apply, "the misrepresentation must have induced the plaintiff to enter into the contract and must not have been specifically related to the subject matter of the contract," i.e., "the misrepresentation must be 'extraneous to, rather than interwoven with, the contract.'"[25] The "fraud in the

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inducement" exception did not apply to Below as the broken sewer line was not "extraneous" to the subject matter of the contract.[26]

The ELD does not, however, apply to statutory claims[27] such as a false advertising claim under Wis. Stat. § 100.18, or a fraudulent misrepresentation claim under Wis. Stat. § 895.446. One may recover "pecuniary" damages, costs and reasonable attorney fees upon proof of a §100.18 violation, and "actual damages," all costs of litigation and exemplary damages upon proof of a §895.446 violation.[28] See Wis JI-Civil 2418 & 2419, respectively. **The ELD also does not apply where the contract was for "services" rather than a "product."**[29]

Verdict

The verdict should be presented in alternatives if the evidence would permit findings on more than one of the three theories. The instructions on damages must indicate clearly to the jury which measure of damages to apply in connection with each finding.

NOTES:

1. Van Lare v. Vogt, Inc., 2004 WI 110, ¶32, 274 Wis. 2d 631, 683 N.W.2d 46.

2. Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156

3. Id., ¶18. In Malzewski, the buyers waived their right to inspect the home despite the real estate condition report disclosing potential defects. The court found that the Malzewskis' reliance on the condition report was not justified to support a claim for intentional misrepresentation. Id.

4. Id., ¶19.

5. Id., ¶19.

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6. Gauerke v. Rozga, 112 Wis. 2d 271, 280, 332 N.W.2d 804 (1983); *see also* Stevenson v. Barwineck, 8 Wis. 2d 557, 99 N.W.2d 690 (1959).

7. Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (Ct. App. 1988).

8. Gauerke, 112 Wis. 2d 271; Harweger v. Wilcox, 16 Wis.2d 526, 114 N.W.2d 818 (1962); Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Lee v. Bielefeld, 176 Wis. 225, 186 N.W. 587 (1922); Ohrmundt v. Spiegelhoff, 175 Wis. 214, 184 N.W. 692 (1921); First Nat'l Bank v. Hackett, 159 Wis. 113, 149 N.W. 703 (1914); Arnold v. National Bank of Waupaca, 126 Wis. 362, 105 N.W. 828 (1905); Matteson v. Rice, 116 Wis. 328, 92 N.W. 1109 (1903); Davis v. Nuzum, 72 Wis. 439, 40 N.W. 497 (1888); Bird v. Kleiner, 41 Wis. 134 (1876).

9. Malzewski, 296 Wis. 2d 98, ¶20. A claim based on "negligent misrepresentation inquires whether the buyer was negligent in relying upon the representation." Lambert v. Hein, 218 Wis. 2d 712, 731, 582 N.W.2d 84 (Ct. App. 1998).

10. Anderson v. Tri State Home Improvement Co., 268 Wis. 455, 67 N.W.2d 853 (1954); Chapman v. Zakzaska, 273 Wis. 64, 76 N.W.2d 537 (1956).

11. Harweger v. Wilcox, 16 Wis.2d 526, 114 N.W.2d 818 (1962); Neas, 10 Wis.2d 47; Anderson v. Tri State Home Improvement Co., 268 Wis. 455.

12. See WIS JI-CIVIL 2405.

13. Gyldenvand v. Schroeder, 90 Wis. 2d 690, 280 N.W.2d 235 (1979).

14. Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc., 148 Wis. 2d 910, 921, 437 N.W.2d 213 (1989).

15. Digicorp, Inc. v. Ameritech Corp., 2003 WI 54, ¶34, 262 Wis. 2d 32, 662 N.W.2d 652.

16. Id., ¶35.

17. State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 225 Wis. 2d 305, 592 N.W.2d 201 (1999).

18. Digicorp, Inc. v. Ameritech Corp., 262 Wis. 2d 32, ¶50.

19. Id., ¶52.

20. Below v. Norton, 2008 WI 77, 310 Wis. 2d 713, 751 N.W.2d 351 (2008).

21. Id., ¶14.

22. Id., ¶20.

23. Id., ¶21.

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24. Id., ¶41.

25. Id., ¶27.

26. Id., ¶39.

27. Id., ¶44; *see also* Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 22, ¶33, 308 Wis. 2d 103, 746 N.W.2d 762.

28. Wis. Stat. §§ 100.18(11)(2), 895.446(3)(1)(a-c).

29. See the line of cases discussing "services" rather than a "product." Linden v. Cascade Stone Co., 2005 WI 113, 283 Wis.2d 60, 699 N.W.2d 189; Ins. Co. of N. Am. v. Cease Elec. Inc., 2004 WI 139, 276 Wis.2d 361, 688 N.W.2d 462; 1325 N. Van Buren, LLC v. T-3 Grp., Ltd., 2006 WI 94, 293 Wis.2d 410, 716 N.W.2d 822.

COMMENT

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2401 MISREPRESENTATION: INTENTIONAL

To constitute intentional misrepresentation, there are five elements[1] which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts of conduct on the part of (defendant) [,or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing; or where there is a relationship of trust or confidence between the parties[2]].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter, such as quality, value, authenticity and the like, does not constitute a representation of fact.[3] However, a statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support the speaker's opinion, may, in your discretion, be determined by you to be a representation of fact.[4] In making your determination, you may consider the form and manner of expression[5] [or the disparity of knowledge between the parties of the underlying facts;[6] or the existence of a trust or confidence relationship between the parties[7]].

Second, that the representation of fact was untrue.

Third, that such untrue representation was made by (defendant) knowing the representation was untrue or recklessly without caring whether it was true or false.

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Representations made by a person who knows that he or she has no sufficient basis of information to justify them are reckless.[8]

Fourth, that (defendant) made the representation with intent to deceive and induce (plaintiff) to act upon it to (plaintiff)'s damage.[9]

Fifth, that (plaintiff) believed such representation to be true and relied on it.[10] [It is not necessary that the representation made be of such character as would influence the conduct of a person of ordinary intelligence and prudence.[11]] Representations are to be tested by their actual influence on the person to whom made [not upon the probable effect of such representation upon some other person[12]]. In determining whether (plaintiff) actually relied upon the representation, the test is whether (plaintiff) would have acted in the absence of the representation.[13] It is not necessary that you find that such reliance was the sole and only motive inducing (plaintiff) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.[14]

If you find, however, that (plaintiff) or the person to whom the representation was made knew it to be untrue, then there can be no justifiable reliance as no one has the right to rely upon representation that he or she knew was untrue.[15]

Nor can there be justifiable reliance if (plaintiff) relied on a representation which (plaintiff) should have recognized as preposterous or which is shown by facts within (his) (her) easy observation and (his) (her) capacity to understand to be obviously untrue.[16]

(Plaintiff) is not required before relying upon the representation of fact to make an independent investigation.[17]

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SPECIAL VERDICT

Question 1: Did (defendant) make the representation of fact as to _____?

(State the ultimate facts alleged to be relied on.)

Answer: _____
Yes or No

Question 2: If you answer "yes" to question 1, answer this question:

Was the representation untrue?

Answer: _____
Yes or No

Question 3: If you answered "yes" to both questions 1 and 2, answer this question:

Did (defendant) make the representation knowing it was untrue or recklessly without caring whether it was true or untrue?

Answer: _____
Yes or No

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Question 4: If you answered "yes" to question 3, answer this question:

Did (defendant) make the representation with the intent to deceive and induce (plaintiff) to act upon it?

Answer: _____
Yes or No

Question 5: If you answered all the preceding questions "yes," answer this question:

Did (plaintiff) believe such representation to be true and justifiably rely on it to (his) (her) financial damage?

Answer: _____
Yes or No

Question 6: If you answered all the preceding questions "yes," answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

Answer: $_____

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NOTE

Short form of ultimate fact (as used in Combined Verdict: Deceit or Negligence) was approved in Rud v. McNamara, 10 Wis.2d 41, 47, 102 N.W.2d 248 (1960), because: "Too many inquiries tend to confuse juries."

COMMENT

This instruction and comment were approved by the Committee in 1969. The comment was revised in 1997, 2001, 2004, 2014, 2016, 2017, and 2018.

For burden of proof, see Wis JI-Civil 205.

For punitive damages, see Wis JI-Civil 1707.1.

Intentional Misrepresentation to Induce Continued Employment. The Wisconsin Supreme Court has refused to recognize a new cause of action for intentional misrepresentation to induce continued employment. Mackensie v. Miller Brewing Co., 2001 WI 23, ¶ 21, 241 Wis.2d 700, 623 N.W.2d 739.

Rescission. Rescission is a remedy for intentional misrepresentation claims. Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201, (1969); Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451. The misrepresentation must be material. Bank of Sun Prairie v. Esser, 155 Wis.2d 724, 456 N.W.2d 585 (1990); Mueller, supra.

Pecuniary. The Committee changed "pecuniary" to "financial" for plain language purposes.

NOTES:

1. Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156.

2. John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶42, 303 Wis. 2d 34, 734 N.W. 2d 827; Van Lare v. Vogt, 2004 WI 110, ¶33, 274 Wis.2d 631, 683 N.W. 2d 46; Novell v. Migliaccio, 2010 WI App 67, ¶10, 325 Wis. 2d 230, 783 N.W. 2d 897 (Ct App 2010); Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); 37 Am.Jur. Fraud and Deceit §§ 144-147 (1941); Killeen v. Parent, 23 Wis.2d 244, 127 N.W.2d 38 (1964).

3. Bentley v. Foyas, 260 Wis. 177, 5 N.W.2d 404 (1952). See also United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

4. 37 Am.Jur.2d Fraud and Deceit §§ 49, 77 (1968); "Opinions may be statements of fact if the representee may rely on them without being guilty of a want of ordinary care and prudence." Kraft v. Wodill, 17 Wis.2d 425, 431, 117 N.W.2d 261 (1962).

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5. J. H. Clark Co. v. Rice, 127 Wis. 451,106 N.W. 231 (1906).

6. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Madison Trust Co. v. Helleckson, 216 Wis. 443, 257 N.W. 691 (1934); Kraft v. Wodill, 17 Wis.2d 425, 431, 117 N.W.2d 261 (1962).

7. Karls v. Drake, 168 Wis. 372, 170 N.W. 248 (1919); Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916); Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶ 13.

8. Stevenson v. Barwineck, 8 Wis.2d 557, 99 N.W.2d 690 (1959); Bachman v. Salzer, 168 Wis. 277, 169 N.W. 279 (1919); Prosser, Law of Torts (3d) § 102 at 716 (1964); Tietsworth v. Harley-Davidson, Inc., supra, ¶ 13.

9. Malzewski v. Rapkin, supra note 1; Household Finance Corp. v. Christian, 8 Wis.2d 53, 98 N.W.2d 390 (1959); Cluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966).

10. Household Finance Corp. v. Christian, supra note 9.

11. Miranovitz v. Gee, supra note 7.

12. Neas v. Siemens, supra note 6.

13. Laehn Coal and Wood Co. v. Koehler, 267 Wis. 297,64 N.W.2d 823 (1954); Prosser, Law of Torts (3d) § 103 at 729 (1964).

14. Household Finance Corp. v. Christian, supra note 9; First National Bank of Oshkosh v. Scieszinski, 25 Wis.2d 569, 131 N.W.2d 308 (1964).

15. Household Finance Corp. v. Christian, supra note 9.

16. Prosser, Law of Torts (3d) § 103 at 731 (1964). Plaintiff must give ordinary attention to facts easily within his purview, Kraft v. Wodill, 17 Wis.2d 425, 430, 117 N.W.2d 261 (1962); Plaintikow v. Wolk, 190 Wis. 218, 222, 208 N.W. 922 (1926). To succeed on a claim for fraudulent misrepresentation, the representation must be a fact and made by the defendant, the representation must have been false, and the plaintiff must have believed the representation was true and relied on it to his damage. Foss v. Madison Twentieth Century Theaters, 203 Wis.2d 210, 551 N.W.2d 862 (Ct. App. 1996), citing Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201, (1969). In Foss, the court said that the law will not permit a person to predicate damage upon statements which he or she does not believe to be true, for if he or she knows they are false, it cannot be said that he or she is deceived by them. Citing First Credit Corp. v. Behrend, 45 Wis.2d 243, 172 N.W.2d 668 (1969). The court said no one has the right to rely on representations he or she knows to be untrue.

17. Restatement, Second, Torts, §§ 540, 541 (1938). Constructive notice of recording acts do not apply to misrepresentations. Schoedel v. State Bank of Newburg, 245 Wis. 74,13 N.W.2d 534 (1944); 152 A.L.R. 459 (1944).

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2402 MISREPRESENTATION: STRICT RESPONSIBILITY

To constitute strict responsibility misrepresentation in this case, there are five elements which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts or conduct on the part of (defendant) [, or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing;[1] or where there is a relationship of trust or confidence between the parties[2]].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter such as quality, value, authenticity and the like, does not constitute a representation of fact.[3] However, a statement of opinion may, in your discretion, be determined by you to be a representation of fact.[4] In making your determination, you may consider the form and manner of expression[5] [or the disparity of knowledge between the parties of the underlying facts;[6] or the existence of a trust or confidence relationship between the parties[7]].

Second, that the representation of fact was untrue.

Third, that (defendant) made the representation as a fact based on (his) (her) own personal knowledge, or in circumstances in which (he) (she) necessarily ought to have known the truth or untruth of the statement. (Plaintiff) must prove that (defendant) represented the fact from (his) (her) personal knowledge, or was so situated that (he) (she) either had particular means of ascertaining the pertinent facts, or (his) (her) position made possible complete knowledge and (his) (her) statements fairly implied that (he) (she) had it.[8]

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Fourth, that (defendant) had an economic interest in the transaction, or, in other words, that (defendant) stood to make a financial gain if (plaintiff) entered into the transaction.[9] It is immaterial whether (defendant) in good faith believed such representation to be true.[10] Likewise, it is immaterial whether (defendant) had any intent to deceive (plaintiff).[11]

Fifth, that (plaintiff) believed such representation to be true and relied on it.[12] [It is not necessary that the representation made be of such character as would influence the conduct of a person of ordinary intelligence and prudence.[13]] Representations are to be tested by their actual influence on the person to whom made, [not upon the probable effect of such representation upon some other person[14]]. In determining whether (plaintiff) actually relied upon the representation, the test is whether (he) (she) would have acted in the absence of the representation.[15] It is not necessary that you find that such reliance was the sole and only motive inducing (him) (her) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.[16]

If you find, however, that (plaintiff) or the person to whom the representation was made knew it to be false, then there can be no justifiable reliance as no one has the right to rely upon a representation that he or she knew was untrue.[17]

Nor can there be justifiable reliance if (plaintiff) relied on a representation which (he) (she) should have recognized as preposterous or which is shown by facts within (his) (her) easy observation and (his) (her) capacity to understand to be obviously untrue.[18]

(Plaintiff) is not required before relying upon the representation of fact to make an independent investigation.[19]

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SUGGESTED SPECIAL VERDICT

Question 1: Did (defendant) make the representation of fact as to _____?

(State the ultimate facts alleged to be relied on.)

ANSWER: _____
Yes or No

Question 2: If you answer "yes" to question 1, then answer this question:

Was the representation untrue?

ANSWER: _____
Yes or No

Question 3: If you answered "yes" to both questions 1 and 2, then answer this question:

Did (defendant) make the representation as a statement based on (his) (her) personal knowledge or in circumstances in which (he) (she) necessarily ought to have known the truth or untruth of such a representation?

ANSWER: _____
Yes or No

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Question 4: If you answered "yes" to both questions 1, 2, and 3, then answer this question:

Did (defendant) have an economic interest in the transaction?

ANSWER: _____
Yes or No

Question 5: If you answered "yes" to questions 1, 2, 3 and 4, then answer this question:

Did (plaintiff) believe the representation to be true and justifiably rely on it to (his)(her) financial damage?

ANSWER: _____
Yes or No

Question 6: If you answered all the preceding questions "yes," then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: $_____

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COMMENT

See Law Note Wis JI-Civil 2400 for a discussion of the economic loss doctrine.

This instruction and comment were approved by the Committee in 1969 and revised in 2018.

For burden of proof, see Wis JI-Civil 205.

NOTES:

1. Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); 37 Am. Jur. Fraud and Deceit § § 144-147 (1941).

2. Killeen v. Parent, 23 Wis.2d 244, 127 N.W.2d 38 (1964).

3. Bentley v. Foyas, 260 Wis. 177, 50 N.W.2d 404 (1952).

4. 37 Am. Jur. Fraud and Deceit § 77 (1941). Prosser, Law of Torts (3d) § 104 at 742 (1964).

5. J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906).

6. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Madison Trust Co. v. Helleckson, 216 Wis. 443, 257 N.W. 691 (1934).

7. Karls v. Drake, 168 Wis. 372, 170 N.W. 248 (1919); Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916).

8. Gauerke v. Rozga, 112 Wis. 2d 271, 332 N.W.2d 804 (1983); Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (Ct. App. 1988); Fowler and Harper, "A Synthesis of the Law of Misrepresentation," 22 Minn. L. Rev. 987-88 (1938).

9. Gauerke v. Rozga, supra note 8; Stevenson v. Barwineck, 8 Wis.2d 557, 99 N.W.2d 690 (1959); Malzewski v. Rapkin, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156.

10. Ohrmundt v. Spiegelhoff, 175 Wis. 214, 184 N.W. 69 (1921).

11. Haentz v. Toehr, 233 Wis. 583, 390 N.W. 163 (1940).

12. Household Finance Corp. v. Christian, 8 Wis.2d 53, 98 N.W.2d 390 (1959); Malzewski v. Rapkin, supra note 9.

13. Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916).

14. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960).

15. Laehn Coal and Wood Co. v. Koehler, 267 Wis. 297, 64 N.W.2d 823 (1954); Prosser, Law of Torts (3d) § 103 at 729 (1964).

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16. Household Finance Corp. v. Christian, supra note 12.

17. Malzewski v. Rapkin, supra note 9; First National Bank in Oshkosh v. Scieszinski, 25 Wis.2d 569, 131 N.W.2d 308 (1961).

18. Prosser, supra § 103 at 731.

19. Restatement, Second, Torts, §§ 540,541 (1938). Constructive notice of recording acts do not apply to misrepresentations. Schoedel v. State Bank of Newburg, 245 Wis. 74, 13 N.W.2d 543 (1944); 152 A.L.R. 459 (1944).

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2403 MISREPRESENTATION: NEGLIGENCE

To constitute negligent misrepresentation in this case, there are four elements which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts or conduct on the part of (defendant)[, or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing; or where there is a relationship of trust or confidence between the parties].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter such as quality, value, authenticity and the like, does not constitute a representation of fact. However, a statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support (his) (her) opinion, may in your discretion, be determined by you to be a representation of fact. In making your determination, you may consider the form and manner of expression [or the disparity of knowledge between the parties of the underlying facts; or the existence of a trust or confidence relationship between the parties].

Second, that the representation of fact was untrue.

Third, that (defendant) was negligent in making this representation. The word "negligence" has the same meaning as the phrase, "failure to exercise ordinary care." A person fails to exercise ordinary care when, without intending to do any wrong, (he) (she)

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makes a misrepresentation under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such misrepresentation will subject the interests of another person to an unreasonable risk of damage. [A person in a particular business or profession owes a duty to exercise the care that is usually exercised by persons of ordinary intelligence and prudence engaged in a like kind of business or profession.]

The making of a misrepresentation, even though made with an honest belief in its truth, is negligence if there was a lack of reasonable care in ascertaining the facts [or if it was made without the skill or competence required in a particular business or profession].

Fourth, (plaintiff) believed the representation to be true and relied on the representation to (his) (her) damage. The question is whether the representation actually misled (plaintiff) and materially affected (his) (her) conduct. In determining whether (plaintiff) actually relied upon the representation, the test is whether (he) (she) would have acted in the absence of the representation. It is not necessary that you find that such reliance was the sole and only motive inducing (him) (her) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.

If you are called upon to answer the question as to whether (plaintiff) was negligent, then the question presented to you is whether (plaintiff) failed to exercise that care and caution which a person of ordinary intelligence and prudence usually exercised in a like or similar situation. In other words, (plaintiff) was negligent if (he) (she) failed to exercise that degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances to ascertain the truth or untruth of the representation. [You are cautioned that the definition of "negligence" is different than the instruction on reliance

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previously given to you. The test here is the effect of the representation upon a person of ordinary intelligence and prudence and not the test of how the representation affected (plaintiff).]

The last question is the comparative negligence question. By your answer to this question you will determine how much or to what extent each party is to blame for the damages, if any, that (plaintiff) suffered. You will weigh the respective contributions of these parties to such damages, if any, and considering the conduct of the parties named in the question, considered as a whole, determine whether one made the same or a larger contribution than the other, and, if so, to that extent it exceeds that of the other. (Plaintiff) has the burden of proving the percentage attributable to (defendant). (Defendant) has the burden of proving the percentage attributable to (plaintiff).

SUGGESTED SPECIAL VERDICTS

Question 1: Did (defendant) make the representation of fact as to _____? (State the ultimate facts alleged to be relied on.)

ANSWER: _____
Yes or No

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Question 2: If you answered "yes" to question 1, then answer this question:

Was the representation untrue?

ANSWER: _____
Yes or No

Question 3: If you answered "yes" to both questions 1 and 2, then answer this question:

Was (defendant) negligent in making the representation?

ANSWER: _____
Yes or No

Question 4: If you answered "yes" to question 3, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it?

ANSWER: _____
Yes or No

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Question 5: If you answered "yes" to question 4, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____
Yes or No

Question 6: If you answered "yes" to both questions 3 and 5, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

100 %

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Question 7: If you answered "yes" to question 4, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) out-of-pocket loss?

ANSWER: $_____

COMBINED VERDICT: DECEIT OR NEGLIGENCE

Question 1: Did (defendant) make an untrue representation of fact, knowing it was untrue, or recklessly without caring whether it was untrue, and with the intent to deceive and induce (plaintiff) to act upon it?

ANSWER: _____
Yes or No

Question 2: If you answered "yes" to question 1, then answer this question:

[In view of all of the evidence, including (plaintiff)'s education, background, and right to rely without independent investigation,] Did (plaintiff) believe the representation to be true and justifiably rely on it to (his) (her) financial damage?

ANSWER: _____
Yes or No

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Question 3: If you answered "yes" to both questions 1 and 2, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damages?

ANSWER: $_____

If you answered "no" to either or both questions 1 and 2, then answer the following questions:

Question 4: Did (defendant) negligently make an untrue representation of fact to (plaintiff)?

ANSWER: _____
Yes or No

Question 5: If you answered "yes" to question 4, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it to (his) (her) financial damage?

ANSWER: _____
Yes or No

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Question 6: If you answered "yes" to questions 4 and 5, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____
Yes or No

Question 7: If you answered "yes" to questions 4 and 6, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

100 %

Question 8: What sum of money would fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: $_____

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COMBINED VERDICT: STRICT RESPONSIBILITY OR NEGLIGENCE

Question 1: Did (defendant) make an untrue representation of fact as based on (his) (her) own personal knowledge, or in circumstances in which (he) (she) necessarily ought to have known the facts?

ANSWER: _____
Yes or No

Question 2: If you answered "yes" to question 1, then answer this question:

[In view of all of the evidence, including (plaintiff)'s education, background, and right to rely without independent investigation,] Did (plaintiff) believe the representation to be true and justifiably rely on it to (his) (her) financial damage?

ANSWER: _____
Yes or No

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Question 3: If you answered "yes" to questions 1 and 2, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: $_____

If you answered "no" to either or both questions 1 and 2, then answer the following questions:

Question 4: Did (defendant) negligently make an untrue representation of fact to the (plaintiff)?

ANSWER: _____
Yes or No

Question 5: If you answered "yes" to question 4, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it to (his) (her) financial damage?

ANSWER: _____
Yes or No

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Question 6: If you answered "yes" to questions 4 and 5, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER: _____
Yes or No

Question 7: If you answered "yes" to questions 4 and 6, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

100 %

Question 8: What sum of money would fairly and reasonably compensate (plaintiff) for (his) (her) out-of-pocket loss?

ANSWER: $_____

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COMMENT

This instruction and comment were approved by the Committee in 1969. The instruction was revised in 2018. The comment was revised in 2014, 2017, and 2018.

For burden of proof, see Wis JI-Civil 200

See Grube v. Daun, 173 Wis.2d 30, 496 N.W.2d 106 (Ct. App. 1992).

For a discussion of puffery as a question of fact, see United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

For a discussion of the effect of "as is" provisions, see Grube v. Daun, supra.

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2405 INTENTIONAL MISREPRESENTATION: MEASURE OF DAMAGES IN ACTIONS INVOLVING SALE [EXCHANGE] OF PROPERTY (BENEFIT OF THE BARGAIN)

A person, injured by intentional misrepresentation in the sale [exchange] of property, is entitled to be fairly and reasonably compensated for any damages the person sustained as a result of the intentional misrepresentation.

In answering question ____, you should determine the amount of money, if any, which represents [either:]

the difference between the fair market value of the property in its condition when purchased by _____ and the fair market value of the property if it had been as it was represented to be by (_____) [or the reasonable cost of placing the property in the condition in which it was represented to be].

"Fair market value" of property is the price paid by a willing buyer and accepted by a willing seller, neither of whom is then under obligation or force to buy or sell.

[For consequential damages, see Wis JI-Civil 3710.]

COMMENT

This instruction was approved by the Committee in 1979 and revised in 1992. The instruction was reviewed without change in 2018.

In cases of fraudulent misrepresentation, the measure of damages adopted in Wisconsin is the "benefit-of-the-bargain" rule. Anderson v. Tri-State Home Improvement Co., 268 Wis. 455, 464, 67 N.W.2d 705 (1955); Ollerman v. O'Rourke Co., Inc., 94 Wis.2d 17, 288 N.W.2d 95 (1980). Gyldenvand v. Schroeder, 90 Wis.2d 690-97, 280 N.W.2d 235 (1979).

Benefit-of-the-bargain damages may be measured in two ways:

1. The difference between the value of the property as represented and its actual value as purchased. Ollerman, supra.

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2. The reasonable cost of placing the property received in the condition in which it was represented to be. Ollerman, supra; Vandehey v. City of Appleton, 146 Wis.2d 411, 431 N.W.2d 679 (Ct. App. 1988).

Consequential damages, such as loss of profits, expense of adapting other property for use with the property plaintiff has been induced to buy from the defendant, travel expenses necessitated because of the purchase, may also be awarded if such damages do not duplicate the recovery gained under the award of benefit-of-the-bargain damages. Ollerman, supra at 53; Gyldenvand, supra. See Dobbs, Remedies (Hornbook series, 1973) at 598.

For indirect or consequential damages for breach of contract, see Wis JI-Civil 3710.

In some cases, evidence will be introduced relating only to one of the alternative tests for benefit-of-the-bargain damages. In such a case, the instruction should be revised by eliminating the appropriate alternative measure.

In negligent misrepresentation cases, damages are determined by applying the "out-of-pocket" rule. See Wis JI-Civil 2406.

For fair market value, see Wis JI-Civil 8100.

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2405.5 STRICT RESPONSIBILITY: MEASURE OF DAMAGES IN ACTIONS INVOLVING SALE [EXCHANGE] OF PROPERTY (BENEFIT OF THE BARGAIN)

Question ___ asks: What sum of money will fairly and reasonably compensate plaintiff for (his) (her) loss of the bargain?

In determining (plaintiff)'s loss of the bargain, you should determine the amount of money, if any, which represents [either:]

the difference between the fair market value of the property in its condition when purchased by _____ and the fair market value of the property if it had been as it was represented to be by (_____) [or the reasonable cost of placing the property in the condition in which it was represented to be].

"Fair market value" of property is the price paid by a willing buyer and accepted by a willing seller, neither of whom is then under obligation or force to buy or sell.

[For consequential damages, See Wis JI-Civil 3710.]

COMMENT

This instruction and comment were approved by the Committee in 1992 and reviewed without change in 2018.

In cases of fraudulent misrepresentation, the measure of damages adopted in Wisconsin is the "benefit-of-the-bargain" rule. Anderson v. Tri-State Home Improvement Co., 268 Wis. 455, 464, 67 N.W.2d 705 (1955); Ollerman v. O'Rourke Co., Inc., 94 Wis.2d 17, 288 N. W.2d 95 (1980). Gyldenvand v. Schroeder, 90 Wis.2d 690-97, 280 N.W.2d 235 (1979).

Benefit-of-the-bargain damages may be measured in two ways:

1. The difference between the value of the property as represented and its actual value as purchased. Ollerman, supra.

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2. The reasonable cost of placing the property received in the condition in which it was represented to be. Ollerman, supra; Vandehey v. City of Appleton, 146 Wis.2d 411, 431 N.W.2d 679 (Ct. App. 1988).

Consequential damages, such as loss of profits, expense of adapting other property for use with the property plaintiff has been induced to buy from the defendant, travel expenses necessitated because of the purchase, may also be awarded if such damages do not duplicate the recovery gained under the award of benefit-of-the-bargain damages. Ollerman, supra, at 53; Gyldenvand, supra. See Dobbs, Remedies (Hornbook series, 1973), at 598.

For indirect or consequential damages for breach of contract, see Wis JI-Civil 3710.

In some cases, evidence will be introduced relating only to one of the alternative tests for benefit-of-the-bargain damages. In such a case, the instruction should be revised by eliminating the appropriate alternative measure.

In negligent misrepresentation cases, damages are determined by applying the "out-of-pocket" rule. See Wis JI-Civil 2406.

For fair market value, see Wis JI-Civil 8100.

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2406 NEGLIGENT MISREPRESENTATION: MEASURE OF DAMAGES IN ACTIONS INVOLVING SALE [EXCHANGE] OF PROPERTY (OUT OF POCKET RULE)

A person injured by negligent misrepresentation in the sale [exchange] of property is entitled to be fairly and reasonably compensated for any damages the person sustained as a result of the misrepresentation.

In answering question ___, the measure of damages is the difference, if any, between the market value of the property at the time of purchase and the amount of money that (plaintiff) paid for the property.

[For consequential damages, see Wis JI-Civil 3710.]

COMMENT

This instruction was approved by the Committee in 1979 and revised in 1992. A reporter's note was deleted in 2014.

Gyldenvand v. Schroeder, 90 Wis.2d 690, 280 N.W.2d 235 (1979): "Prosser, Law of Torts (Hornbook Series, 4th ed. 1971), at 734, . . . notes that it has been suggested that the loss of bargain rule should be applied in cases of intentional misrepresentation, while the out-of-pocket rule applies where negligent misrepresentation is found." See also Costa v. Neimon, 123 Wis.2d 410, 336 N.W.2d 896 (Ct. App. 1985).

Consequential damages, such as loss of profits, expense of adapting other property for use with the property plaintiff has been induced to buy from the defendant, travel expenses necessitated because of the purchase, may also be awarded if such damages do not duplicate the recovery gained under the award of out-of-pocket damages. Gyldenvand, supra. See Dobbs, Remedies (Hornbook series, 1973), at 598.

See instruction 3710 for consequential damages for breach of contract.

In intentional misrepresentation cases, damages are found by applying the "benefit-of-the-bargain" rule. See Wis JI-Civil 2405.

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2418 UNFAIR TRADE PRACTICE: UNTRUE, DECEPTIVE, OR MISLEADING REPRESENTATION: WIS. STAT. § 100.18(1)

To constitute an untrue, deceptive, or misleading representation in this case, there are three elements which must be proved by (plaintiff).

First, (defendant) made, published, or placed before one or more members of the public an advertisement, announcement, statement, or representation concerning the (sale) (hire) (use) (lease) (distribution) of _____ [**Note**: indicate nature of the sales promotion]. An advertisement, announcement, statement, or representation can be oral or written. It can appear in a newspaper, magazine, or other publication or it can be made by telephone or over radio or television. It may take the form of a notice, handbill, circular, pamphlet, letter, or any other means of (publishing) (disseminating) (circulating) it. [It may also take the form of a face-to-face communication.]

Second, the advertisement or announcement contained a(n) (assertion) (representation) (statement) that was untrue, deceptive, or misleading. A(n) (assertion) (representation) (statement) is untrue if it is false, erroneous, or does not state or represent things as they are. A(n) (assertion) (representation) (statement) is deceptive or misleading if it causes a reader or listener to believe something other than what is in fact true or leads to a wrong belief. The (assertion) (representation) (statement) need not be made with knowledge as to its falsity or with an intent to defraud or deceive so long as it was made with the intent to (sell) (distribute) the _____ [product or item] or with the intent to induce the (purchase) (use) of the _____ [product or item].

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Third, (plaintiff) sustained a monetary loss as a result of the (assertion) (representation) (statement). In determining whether (plaintiff)'s loss was caused by the (assertion) (representation) (statement), the test is whether (plaintiff) would have acted in its absence. Although the (assertion) (representation) (statement) need not be the sole or only motivation for (plaintiff)'s decision to (buy) (rent) (use) the _____ [product or item], it must have been a material inducement. That is, the (assertion) (representation) (statement) must have been a significant factor contributing to (plaintiff)'s decision. [You may consider the reasonableness of (plaintiff)'s reliance on the (assertion) (representation) (statement) by (defendant) in determining whether the (assertion) (representation) (statement) materially induced (plaintiff) to sustain a monetary loss.]

(Give Wis JI-Civil 200.)

COMMENT

This instruction and comment were approved in 1998. The instruction was revised in 2009. The comment was updated in 2001, 2004, 2008, 2009, 2014, 2016, and 2017. A reporter's note was removed in 2014.

Elements. There are three elements to a § 100.18 claim: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was "untrue, deceptive or misleading," and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff. K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 ¶ 49.

Reliance; Cause. In Novell v. Migliaccio, 2008 WI 44, 309 Wis.2d 132, 749 N.W.2d 544, the supreme court held that a plaintiff is not required to prove reasonable reliance as an element of a § 100.18 claim. However, the court said "reasonableness of a plaintiff's reliance may be relevant in considering whether the misrepresentation materially induced (caused) the plaintiff to sustain a loss. See also K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792.

In K&S Tool & Die Corp., the court contrasted § 100.18 claims with common law misrepresentation claims and concluded that unlike common law causes of action for misrepresentation, reasonable reliance is not the standard for a § 100.18 claim because the legislature created a distinct cause of action.

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The reasonableness of a person's actions in relying on representations is a "defense" and may be considered by a jury in determining cause. Novell, supra, ¶ 49. A jury may consider the reasonableness of a person's reliance on a representation in determining whether there had been a material inducement. Novell, supra, ¶ 50; K & S Tool & Die, supra, ¶ 36.

Economic Loss Doctrine. In Below v. Norton, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the supreme court held that the economic loss doctrine bars common law claims for "intentional misrepresentation" in residential real estate transactions. It also held that a plaintiff in such a transaction would still have "statutory and contractual remedies," noting in particular that the plaintiffs § 100.18 claim was still viable because it had been remanded to the trial court.

Burden of Proof Under Wis. Stat. § 100.20 (5). In Benkoski v. Flood, 2001 WI App 84, ¶ 17, 242 Wis.2d 652, 626 N.W.2d 851, the court said the application of the ordinary civil burden of proof fosters the remedial purposes and policies underlying § 100.20(5).

Pecuniary Loss in Wis. Stat. § 100.20(5). The court of appeals has said that the "pecuniary loss" concept set out in Wis. Stat. § 100.20(5) is similar to the concept explained in JI-Civil 3735, Damages: Loss of Expectation. Benkoski v. Flood, 2001 WI App 84, ¶ 32, 242 Wis.2d 652, 626 N.W.2d 851. See also Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451, where the court of appeals discusses this instruction.

Silence. A non-disclosure does not constitute an "assertion, representation or statement of fact" under Wis. Stat. § 100.18(1). Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶ 4, 39, and 40. Silence is insufficient to support a claim.

Members of the Public. When there is an issue whether the plaintiff was a "member of the public" under § 100.18, see K & S Tool & Die Corp., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 and State v. Automatic Merchandisers of America, Inc., 64 Wis.2d 659, 221 N.W.2d 683 (1974). Whether the plaintiff is a member of the public presents a question of fact. K & S Tool & Die Corp., supra.

Puffery. See United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

Advertisements. The court of appeals has held that the plain language of Wis. Stat. § 100.18 "shows that statements or representations may be actionable even when contained in bills or other documents not traditionally considered 'advertisements.'" MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2013 WI App 14, 346 Wis.2d 173, 828 N.W.2d 575. Applying this holding to the facts of the case, the court concluded that phone bills and representations in the bills that induced the plaintiff to pay for services it did not authorize are among the kind of misleading representations that Wis. Stat. §100.18 prohibits.

Voluntary Payment Doctrine. The court in MBS, supra, also held that the voluntary payment doctrine does not apply to claims under Wis. Stat. § 100.18, 100.207, or the Wisconsin Organized Crime Control Act (Wis. Stat. §§ 946.80-946.88).

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Under the common law voluntary payment doctrine, a party cannot bring an action to recover payments that were paid voluntarily with full knowledge of the material facts, and absent fraud or wrongful conduct inducing payment. See MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2012 WI 15, 338 Wis.2d 647, 809 N.W.2d 857.

Rescission. In 2014, the court of appeals held that Wis. Stat. § 100.18 permits plaintiffs, in some instances, to recover a refund of the purchase price. However, the statute which permits recovery only for "pecuniary loss," does not permit rescission as a remedy. A plaintiff can receive rescission as a remedy for intentional misrepresentation when the misrepresentation is material. Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451; see Wis JI-Civil 2405.

As-Is Clause. In Fricano v. Bank of America, 2016 WI App 11, 366 Wis.2d 748, 875 N.W.2d 143, the court said an "as is" and exculpatory clauses in the parties' contract did not relieve the bank/seller of liability under Wis. Stat. § 100.18 for its deceptive representation in the contract which induced agreement to such terms. The trial court in Fricano, instructed the jury on the "as is" clause as follows:

> An 'as is' clause does not relieve the defendant, Bank of America, from a duty to disclose a material adverse fact about the property.
>
> The buyer still has the burden of proof to prove that Bank of America had knowledge of the condition of the property and failed to disclose it. The buyer is entitled to rely upon a statement by the defendant, Bank of America, that it has no knowledge about the property. Bank of America may not use an as-is clause to relieve the bank of its responsibility to disclose conditions about the condition of the property. In these situations, the exculpatory clause still may have evidentiary value for the purpose of showing that no representations were relied upon.

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2419 PROPERTY LOSS THROUGH FRAUDULENT MISREPRESENTATION: WIS. STAT. § 895.446 (Based on Conduct (Fraud) Prohibited by Wis. Stat. § 943.20)

To recover for a fraudulent misrepresentation, (plaintiff) must prove by evidence that satisfies you to a reasonable certainty by the greater weight of the credible evidence that the following six elements were present:

First, that (defendant) made a representation to (plaintiff).

Second, that (defendant) knew that the representation was false.

Third, that (defendant) made the representation with intent to deceive and to defraud (plaintiff).

Fourth, that (plaintiff) was deceived by the representation.

Fifth, that (plaintiff) was defrauded by the representation.

Sixth, that (defendant) obtained money through the sale of property to (plaintiff).

The first element requires that (defendant) made a false representation to (plaintiff). This requires that the false representation be one of fact. It does not include expressions of opinions or representations of law.

The second element requires that (defendant) knew or believed that the representation was untrue.

The third element requires that (defendant) made the representation with intent to deceive and defraud (plaintiff). This element requires that (defendant) intended to deceive and defraud (plaintiff) or that (defendant) believed that (his) (her) representation would deceive and defraud (plaintiff).

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You cannot look into a person's mind to find out (his) (her) intent. You may determine intent directly or indirectly from all the facts in evidence. You may consider any statement or conduct of (defendant) that indicates (his) (her) state of mind.

The fourth element requires that (plaintiff) must have been misled by (defendant)'s false representation.

The fifth element requires that (plaintiff) was defrauded by the representation. This requires that (plaintiff) did in fact part with money in reliance (at least in part) on the false representation.

The sixth element requires that (defendant) obtained money through the sale of property by making a false representation.

[Burden of Proof: Give Wis JI-Civil 200.]

COMMENT

This instruction and comment were approved in 2000. The instruction was revised in 2018. The comment was updated in 2009. The statutory reference in the title was revised in 2009.

The instruction is based on a claim based on theft by fraud in violation of Wis. Stat. § 943.20. Other types of criminal conduct, such as retail theft, worthless checks, fraud on innkeeper, and theft by contractor (see Tri-Tech Corp. v. Americomp Serv., 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822), also serve as a possible basis for a claim under Wis. Stat. § 895.446. If one of these other grounds of liability is claimed, this instruction must be adapted to the elements of the particular criminal statute.

The burden of proof is the ordinary burden. See Wis. Stat. § 895.446(2).

Economic Loss Doctrine. In Below v. Norton, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the Wisconsin Supreme Court ruled that the Economic Loss Doctrine (ELD) bars common law claims for intentional misrepresentation in real estate transactions. It, nevertheless, noted that the plaintiff still had available "statutory and contractual remedies." The court noted "the issue of whether the ELD bars claims under Wis. Stat. § 895.446 (formerly Wis. Stat. § 895.80) for a violation of Wis. Stat. § 943.20(1)(d) also was presented for our review. However, we decline to address that issue . . ." The claim was remanded for development of the record. See 2008 WI 77, ¶ 7.

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2420 CIVIL THEFT: WIS. STAT. § 895.446 (Based on Conduct (Theft) Prohibited by Wis. Stat. §943.20(1)(a))

Theft is committed by one who intentionally (takes and carries away) (uses) (transfers) (conceals) (retains possession of)[1] movable property of another without consent and with intent to deprive the owner permanently of possession of the property. In order to recover for a civil theft, (plaintiff) must prove by evidence that satisfies you to a reasonable certainty by the greater weight of the credible evidence that the following four elements were present:

First, that defendant intentionally took and carried away movable property of another.[2]

The term "intentionally" means the defendant must have had the mental purpose to take and carry away the property.[3] You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

"Movable property" means property whose physical location can be changed.[4]

Second, that the owner of the property did not consent[5] to the taking and carrying away the property.

Third, that the defendant knew that the owner did not consent.[6]

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Fourth, that the defendant intended to deprive the owner permanently of the possession of the property.

[Burden of Proof: Give Wis JI-Civil 200.]

COMMENT

This instruction and comment were approved by the Committee in 2018.

The instruction is based on a claim of theft in violation of Wis. Stat. § 943.20. Other types of criminal conduct, such as retail theft, worthless checks, fraud on an innkeeper, and theft by contractor (see Tri-Tech Corp. v. Americomp Serv., 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822), also serve as a possible basis for a claim under Wis. Stat. § 895.446. If one of these other grounds of liability is claimed, this instruction must be adapted to the elements of the particular criminal statute.

The burden of proof is the ordinary burden See Wis. Stat. § 895.446(2)

Damages. In Estate of Miller v. Storey, 2017 WI 99 (Nov. 30 2017), the Wisconsin Supreme Court held that civil theft actions, under Wis. Stat. section 895.446, are not actions based in tort – ruling that the estate could obtain a $10,000 actual damage award. The majority also ruled that double costs were authorized and that the estate could obtain attorney fees as "costs of investigation and litigation" under § 895.466(3)(b). However, a majority ruled that the appeals court did not commit an error in reversing the circuit court's award of $20,000 in exemplary damages.

1. One of the five alternatives in parenthesis should be selected. The rest of the instruction is drafted for a case where the act is alleged to be "takes and carries away," which, in the Committee's judgment, is the most commonly charged alternative.

In State v. Genova, 77 Wis,2d 141, 252 N.W.2d 380 (1977), the Wisconsin Supreme Court approved the construction of the theft statute adopted in Wis JI-Criminal 1441. A theft charge had been dismissed on the basis that the complaint charged only that the defendant had transferred property and no that he had taken the property and transferred it. The Wisconsin Supreme Court held that the complaint had been sufficient in charging only "transfer." The statute should be read as though the following "ors" appeared in it: takes and carries away, or transfers, or conceals, or retains. A violation of the statute need not include a taking from the owner.

2. Define "movable property of another" if necessary. The term is defined as follows in §§ 939.22(28) and 943.20(2)(c):

> 939.22(28) "Property of another" means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.
>
> 943.20(2)(c): "Property of another" includes property in which the actor is a co-owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife.

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3. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of this instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

4. This is based on the definition of "movable property" in §943.20(2)(a) which provides:

> (a)"Movable property" is property whose physical location can be changed, without limitation including electricity and gas, documents which represent or embody intangible rights, and things growing on, affixed to or found in land.
>
> Section 943.20(2) defines "property" as follows:
>
> (b) "Property" means all forms of tangible property, whether real or personal, without limitation including electricity and gas, documents which represent or embody a chose in action or other intangible rights.

5. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides and instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word "intentionally" in the statute.

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2500 DEFAMATION[1]: LAW NOTE FOR TRIAL JUDGES

INTRODUCTION

The three basic components of a defamatory communication are:

a. the statement is false,

b. the statement is communicated by speech, conduct, or in writing to a person other than the person defamed, and

c. the communication is unprivileged and tends to harm one's reputation as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.

1. **Elements**. The elements of a common law action for defamation are: (1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. Ladd v. Uecker, 2010 WI App 28, 323 Wis.2d 798, 780 N.W.2d 216; Laughland v. Beckett, 2015 WI App 70, 365 Wis.2d 148, 870 N.W.2d 466.

2. **Libel or Slander**. A defamation action can be founded upon either libel or slander. Martin v. Outboard Marine Corp., 15 Wis.2d 452, 113 N.W.2d 135 (1962).

3. **Truth**. Substantial truth of the statement is an absolute defense to a defamation claim. Schaefer v. State Bar of Wis., 77 Wis.2d 120, 252 N.W.2d 343 (1977); DeMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973).

4. **Publication**. Actionable defamation requires publication or communication. The required parts of this element are: (a) the words must be intentionally or negligently communicated to a person other than the person defamed, and (b) the communication must identify the person defamed expressly or by reasonable inference. Ranous v. Hughes, 30 Wis.2d 452, 461-62, 141 N.W.2d 251 (1966); Schoenfeld v. Journal Co., 204 Wis. 132, 235 N.W. 442 (1931); Wis. Stat. § 802.03(6); Restatement, Second, Torts § 577 (1977).

5. **Opinion**. Generally, the defamatory communication must be a statement of fact. An expression of opinion generally cannot be the basis of a defamation action. However, where the defamer departs from expressing "pure opinion" and communicates what the courts have described as "mixed opinion," then liability may result. In Gertz v. Robert Welch, Inc., 418

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[1] This law note was approved in 1987 and revised in 2016. The format was revised in 2002.

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U.S. 323, 339 (1974), the Supreme Court stated that there can be no such thing as a "false idea." "Mixed opinion" is a communication which blends an expression of opinion with a statement of fact. This type of a communication is actionable if it implies the assertion of undisclosed defamatory facts as the basis of the opinion. Restatement, Second, Torts § 566 (1977). Communications are not made nondefamatory as a matter of law merely because they are phrased as opinions, suspicions, or beliefs. Converters Equip. Corp. v. Condes Corp., 80 Wis.2d 257, 263-64, 258 N.W.2d 712 (1977); Laughland v. Beckett, 2015 WI App 70.

6. **Privilege**. Some defamatory statements are protected by privileges created by common law, state and federal constitutions, or by statute. These privileges are discussed on pages 7 and 8 of this law note.

KEY DEFINITIONS

1. **Defamatory**. Wisconsin has adopted the definition of "defamatory" stated in Restatement, Second, Torts § 559 (1977):

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement, 3 Torts, p. 156, sec. 559; Ranous v. Hughes, 30 Wis.2d 452, 460 (1966).

2. **Implied Malice**. Wisconsin law applies a strict liability theory to the communication of a defamatory falsehood by a private defendant about a private plaintiff when there is no conditional privilege involved. The law implies "malice" in the communication and no showing of "malice" is required to recover compensatory damages. Denny v. Mertz, 106 Wis.2d 637, 657, 318 N.W.2d 141 (1982).

3. **Express Malice**. Express malice arises from ill will, bad intent, or malevolence towards the defamed party. Such malice exists when slanderous words are uttered or libelous words are published from motives of ill will, envy, spite, revenge, or other bad motives against the person defamed. Polzin v. Helmbrecht, 54 Wis.2d 578, 587, 196 N.W.2d 685 (1972). This type of malice is sometimes referred to as "common-law" malice. See page 5 for a discussion of the difference between actual and express malice.

4. **Actual Malice**. Actual malice exists when there is a statement made with knowledge that it is false or with reckless disregard of whether such statement is false or not. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Polzin, supra at 587-88. See page 5 for a discussion of the difference between actual and express malice.

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5. **Public Figure**. The court in Denny v. Mertz, supra at 649-50, adopted the following test based on Gertz v. Robert Welch, Inc., supra, to determine whether an individual is a public figure:

> Analyzing the above cases, we consider the following criteria applicable to whether a defamation plaintiff may be considered a public controversy. First, there must be a public controversy. While courts are not well-equipped to make this determination as pointed out in Gertz, the nature, impact, and interest in the controversy to which the communication relates has a bearing on whether a plaintiff is a public figure. Secondly, the court must look at the nature of the plaintiff's involvement in the public controversy to see whether he has voluntarily injected himself into the controversy so as to influence the resolution of the issues involved. Factors, relevant to this test are whether the plaintiff's status gives him access to the media so as to rebut the defamation and whether a plaintiff should be deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. Gertz, 418 U.S. at 344-45.

The status of the plaintiff as a public figure or public official is significant in determining the level of "fault" the plaintiff must show to recover. A public figure suing a defendant protected by a conditional constitutional privilege must show actual malice instead of simple negligence.

TRIAL COURT'S INQUIRY ON WHETHER THE STATEMENT IS DEFAMATORY

The initial inquiry in a defamation action is usually whether the words at issue in the lawsuit are capable of a defamatory meaning. This inquiry is for the trial judge and is normally presented on a motion to dismiss. On a motion to dismiss, it is the function of the court to determine whether a communication is capable of a defamatory meaning. If the communication is capable of a defamatory as well as a nondefamatory meaning, then a jury question is presented. Only if the communication cannot reasonably be understood as defamatory should the motion be granted. Starobin v. Northridge Lakes, 91 Wis.2d 1, 287 N.W.2d 747 (1980). See also Denny v. Mertz, supra; Westby v. Madison Newspapers, Inc., 81 Wis.2d 1, 5, 259 N.W.2d 691 (1977); Schaefer v. State Bar of Wis., supra; DiMiceli v. Klieger, supra; Polzin v. Helmbrecht, supra; Lathan v. Journal Co., 30 Wis.2d 146, 140 N.W.2d 417 (1966). The question to the jury is whether the communication made was reasonably understood in a defamatory sense by the persons to whom it was published. Schaefer, supra at 124-25.

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The legal standard for determining whether a statement is capable of conveying a defamatory meaning is whether the language is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and proper one. Meier v. Meurer, 8 Wis.2d 24, 29, 98 N.W.2d 411 (1959). In Frinzi v. Hanson, 30 Wis.2d 271, 276, 140 N.W.2d 259 (1966), the court said:

> The words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered.

Thus, Wisconsin applies the "reasonable interpretation" test. The trier of fact should not give the statement a "strained" or "unstructured construction," and the statement should be evaluated in context. Schaefer v. State Bar of Wis., supra. On a motion to dismiss, how does this "reasonable interpretation" standard relate to the requirement that complaints are to be liberally construed? Wis. Stat. § 802.03(6) governs pleadings in an action for libel or slander:

> (6) LIBEL OR SLANDER. In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

MALICE IN DEFAMATION ACTIONS

Wisconsin defamation law recognizes three types of malice: implied malice, actual malice, and express malice.

1. **Implied Malice**. The element of malice creates some confusion in analyzing the various types of defamation actions. As a general principle, Wisconsin tort law holds that malice is an element of actionable defamation. Denny v. Mertz, supra at 657. However, the supreme court has implied the existence of such malice from the publication of a defamatory statement itself unless a conditional privilege applies. Polzin v. Helmbrecht, supra; Denny v. Mertz, supra at 657.

2. **Actual Malice and Express Malice**. In cases where a constitutional privilege is involved or where punitive damages are being sought, the difference between actual and express malice is important. The definitions of these two types of malice are contained in the following passage from Calero v. Del Chemical Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975):

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"Actual malice" in defamation cases refers to a constitutional standard that is something other than malice as such. As this court said in Polzin v. Helmbrecht (1972), 54 Wis.2d 578, 587, 588, 196 N.W.2d 685:

At the outset it is important to note that there are two types of malice: "Express malice" is that malice described in the jury instruction used in this case, that is "ill will, envy, spite, revenge," etc.; the supreme court in Rosenbloom also referred to this type of malice as "common law malice." "Actual malice" (referred to in the New York Times case) is not malice at all, rather it is knowledge that a statement was false or published with reckless disregard of whether it was false or not. "Actual malice" is what is required for a constitutional determination of libel under New York Times.

"Express" and "actual" malice are very different concepts.

The term "actual malice" arises when there has been an abuse of a constitutional conditional privilege, i.e., where one makes a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan (1964), 376 U.S. 254, 279, 280 84 Sup. Ct. 710, 11 L.Ed.2d 686; 95 A.L.R.2d 1412.

The problem of actual malice arises in the cases involving first amendment protections afforded to the media, such as newspapers, television and radio, or comments made about public officers or public figures.

DEFENSES TO A DEFAMATION CLAIM

1. **Truth**. As stated earlier, the "substantial truth" of the alleged defamatory statement is an absolute defense to the claim. Schaefer v. State Bar of Wis., supra. In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). At least in cases involving a media defendant, this holding changes Wisconsin common law which had placed the burden of proving that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661 n.35, 318 N.W.2d 141 (1982). Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege. It is uncertain whether the holding by the Court applies to all defamation claims or only to those where the defendant asserts a constitutional conditional privilege. The Court reserved this question. Special attention should be given to footnote 4 of the decision and the concurrence of Justices Brennan and Blackmun. The

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footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.

2. **Privilege.** Wisconsin law recognizes certain privileges which protect the communicator of a defamatory statement from liability. These privileges have been created to allow citizens, public officials, and media personnel to engage in communications which are useful to society with some protection from liability for the consequences which result from the communications. The most litigated of these privileges involve conditional privileges.

a. Absolute privilege

This type of privilege protects participants in judicial and legislative proceedings. Spoehr v. Mittlestadt, 34 Wis.2d 653, 150 N.W.2d 502 (1967); Hartman v. Buerger, 71 Wis.2d 393, 398-400, 238 N.W.2d 505 (1976); Restatement, Second, Torts §§ 583-92 (1977). As a general rule, this privilege protects the communicator of the defamatory statement if the statement has some relation to the matter involved in the proceeding.

b. Conditional privileges created by common law

Wisconsin law recognizes that some communications are conditionally privileged. In Lathan v. Journal Co., supra at 152, the court stated:

There are also certain occasions where a defamation is conditionally privileged. Conditional privileges or immunities from liability for defamation are based on public policy which recognizes the social utility of encouraging the free flow of information in respect to certain occasions and persons, even at the risk of causing harm by the defamation.

At common law, a person is privileged to make a statement about another person even though it is defamatory, so long as he or she is making the statement to protect certain defined interests and he or she did not abuse the privilege.

The types of communications that are protected by a conditional privilege are those statements (1) to protect the communicator's interest; (2) to protect the interest of the recipient or a third person; (3) to protect a common interest or a family relationship; and (4) statements to a person who may act in the public interest. Restatement, Second, Torts §§ 594-98 (1977).

When the defamatory communication is privileged, the law will not imply or impute malice. Hett v. Ploetz, 20 Wis.2d 55, 121 N.W.2d 270 (1963). If the privilege is abused, the

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communicator of the defamatory statement is not protected. In earlier case law, the court had held that this type of privilege is "conditional" because the statement must be reasonably calculated to accomplish the privileged purpose and must be made without "malice." Hett v. Ploetz, supra. Later, in Ranous v. Hughes, supra, the court recognized that the word "malice" expressed in the Hett decision was "probably unfortunate." 30 Wis.2d at 468. The court, instead of retaining the "malice" concept from Hett, adopted the Restatement approach which speaks in terms of "abuse of privilege." The court then recognized the four conditions contained in Restatement, Second, Torts which may constitute an abuse of the privilege: (1) The defendant either did not believe in the truth of the defamatory matter, or, if believing the defamatory matter to be true, had no reasonable grounds for so believing; (2) because the defamatory matter was published for some purpose other than that for which the particular privilege is given; (3) because the publication was made to some person not reasonably necessary for the accomplishment of the particular privilege; or (4) because the publication included defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given.

A finding of express malice, i.e., ill will, spite, etc., will also constitute an abuse of the conditional privilege. Calero, supra; Polzin, supra at 584; Ranous v. Hughes, supra at 469; Restatement, Second, Torts § 603 Comment a (1977).

Subsequent to the decision of the United States Supreme Court in Gertz v. Robert Welch, Inc., supra, the Restatement substituted a new test of abuse of privilege, namely: "actual knowledge of falsity or reckless disregard as to truth or falsity."

C. Conditional privileges created by the United States Constitution

A constitutional conditional privilege refers to the protection afforded media sources (and also to nonmedia persons, where the statement involves a matter of a public interest or concern) under the first amendment. The principal case establishing this constitutional privilege is New York Times Co. v. Sullivan, supra. The effect of the constitutional conditional privilege is that the court will require some finding of "fault" on the part of the defendant instead of allowing the strict liability which exists at common law where malice is implied. The degree of "fault" required by this privilege depends on the nature of the plaintiff. Where the plaintiff is a private individual, only negligence by the defendant media source or individual is required to be shown. Denny v. Mertz, supra. However, where the plaintiff is a public official or public figure, a higher level of fault must be shown. In this type of case, the plaintiff must show that the defamatory statement was published with "actual malice," i.e., actual knowledge or with reckless disregard of whether the statement was true or false. In discussing the Gertz decision, the court, in Denny v. Mertz, explained

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the rationale in Gertz for permitting a less rigorous showing of "fault" when a private plaintiff was seeking recovery. The court, in Denny, supra at 645, stated:

The [Gertz] court justified divergent standards for public figures and private individuals on the ground that public figures had greater access to the media and so could more effectively counteract defamations. It also reasoned that public figures had, by seeking prominent roles for themselves, assumed a risk of being libeled, which was not true of private individuals. 418 U.S. at 344.

In Gertz v. Robert Welch, Inc., supra, the United States Supreme Court permitted the states to adopt the degree of protection to be afforded statements involving private persons so long as the states did not impose liability without fault. The Wisconsin Supreme Court, in response to Gertz, stated that in a defamation action involving a private plaintiff in a matter of private concern, the required showing of fault is simple negligence. Denny v. Mertz, supra.

D. Statutory privilege

Wisconsin statutes create an absolute privilege which protects persons reporting legislative, judicial, or other public official proceedings. Wis. Stat. § 895.05(1) states:

Damages in Actions For Libel. (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication of such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

TYPES OF DEFAMATION ACTIONS

Generally, an action for defamation will fall into one of four categories according to the nature of the parties. At the end of this law note, there is a chart which compares the various types of defamation actions. These categories are:

a. Private individual versus a private individual with no conditional privilege applicable.

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b. Private individual versus a private individual with a conditional nonconstitutional privilege applicable.

c. Private individual versus a media defendant which will always involve a conditional constitutional privilege.

d. Public official or public figure versus a media or nonmedia defendant which will always involve a conditional constitutional privilege.

In each of these categories, the requisite showing of "fault" is different.

1. When the action is brought by a private individual against another private individual, with no privilege involved, existence of malice is implied from the libelous matter itself. Denny, supra at 657.

2. When the action is brought by a private individual against another private individual, with a conditional nonconstitutional privilege involved, liability can be established by proof of the defamatory statement, Calero v. Del Chemical Corp., supra at 500, and abuse of the conditional privilege, Ranous, supra at 468.

3. When the action is brought by a private individual against a media defendant, thereby involving a conditional constitutional privilege, liability is established by proof that the media defendant was negligent in broadcasting or publishing the defamatory statement. Denny, supra at 654.

4. In a case involving a public official or public figure, as defined in Denny, against a media defendant or a nonmedia individual, thereby involving a conditional constitutional privilege, the plaintiff must prove actual malice. New York Times Co., supra at 726; Calero, supra at 500; Polzin, supra at 586; see also Dalton v. Meister, 52 Wis.2d 173, 188 N.W.2d 494 (1971).

BURDEN OF PROOF TO ESTABLISH CAUSE OF ACTION

1. In a case involving a private individual against another private individual, with no privilege involved, existence of malice is implied. The burden of proof of showing the defamatory statement was made is the ordinary burden. Denny, supra at 657.

2. In the case involving a private individual versus a private individual, with a conditional nonconstitutional privilege involved, the plaintiff has the ordinary burden of proof to show the defamatory statement was made; i.e., greater weight of the

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credible evidence to a reasonable certainty. Calero, supra at 500. The defendant has the ordinary burden to prove privilege as a defense to the action. Calero, supra at 499.

3. In the case involving a private individual versus a media defendant, the plaintiff has the ordinary burden of proof; i.e., the greater weight of the credible evidence to a reasonable certainty. There is no Wisconsin case directly stating that the plaintiff has the ordinary burden of proof. However, the Gertz decision permits individual states to define for themselves the appropriate standard of liability in such cases. The court in Denny, supra at 654, established for Wisconsin that a private individual need only prove that a media defendant was negligent in broadcasting or publishing a defamatory statement. With negligence as the standard, the Committee concluded that ordinary burden of proof applies.

4. In cases involving a public official or a public figure versus a media defendant or private individual, the plaintiff has the middle burden of proof, i.e.; by evidence that is clear, satisfactory, and convincing to a reasonable certainty. Polzin, supra at 586; Calero, supra at 500.

RECOVERY OF COMPENSATORY DAMAGES

It is not necessary in libel actions to plead or prove actual damages of a pecuniary nature, called special damages. Dalton v. Meister, supra; Lawrence v. Jewell Companies, Inc., 53 Wis.2d 656, 193 N.W.2d 695 (1972). If the writing alleged to be libelous is determined by the court to be capable of a defamatory meaning, an allegation of general damages is sufficient. Slanderous statements may, in certain instances, be classified as defamatory and slanderous per se, and, in such instances, the plaintiff may plead and recover general damages. Starobin v. Northridge Lakes Co., supra. Oral statements imputing certain crimes, a loathsome disease, or affecting the plaintiff in his business, trade, profession, or office, or of unchastity to a woman are actionable without proof of special damages. All other slander not falling into these seemingly artificial categories is not actionable without alleging and proving special damages. Martin v. Outboard Marine Corp., supra.

In Denny v. Mertz, supra, the court stated that items of damage recoverable in libel and slander actions in Wisconsin are set forth in Wis JI-Civil 2516.

The burden of proof is the ordinary civil burden.

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RECOVERY OF PUNITIVE DAMAGES

In cases involving a private individual against a private individual, whether or not a conditional unconstitutional privilege is involved, the plaintiff must establish express malice to recover punitive damages. Calero supra at 506; Dalton v. Meister, supra at 179.

In cases involving a private individual against a media defendant, the plaintiff must prove actual malice to recover punitive damages. Gertz, supra; Denny, supra at 659.

In cases involving a public official or public figure against a media defendant or nonmedia individual, the plaintiff can only recover punitive damages upon a showing of express malice.

> It should finally be noted that in a case such as this where the New York Times standards apply and where punitive damages are sought, there must be a finding of both express and actual malice to support an award of punitive damages: "Express malice" to meet the criteria for awarding punitive damages and "actual malice" to meet the constitutional requirements for liability at all. Polzin at 588.

The decision in Wangen v. Ford Motor Co., 97 Wis.2d 260, 300, 294 N.W.2d 437 (1980), establishes the standard for the required degree of proof to be applied to punitive damage claims. In Wangen, the court held that the middle burden of proof shall apply to punitive damage claims. Therefore, the plaintiff must establish its punitive damage claims to a reasonable certainty by evidence that is clear, satisfactory, and convincing. This burden of proof applies to all types of defamatory actions, whether involving conditional privileges or not.

ADDITIONAL REFERENCE MATERIAL

For additional discussion of defamation law in Wisconsin, see Brody, "Defamation Law of Wisconsin," 65 Marq. L. Rev. 505 (1982).

TYPES OF DEFAMATION ACTIONS - CHART

The following page compares the different types of defamation actions as to elements and burdens of proof.

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TYPES OF DEFAMATION ACTIONS IN WISCONSIN

Type of Plaintiff	Type of Defendant	Degree of "Fault" Necessary for Compensatory Damages	Burden of Proof for Compensatory Damages	Conduct Necessary for Punitive Damages	Burden of Proof for Punitive Damages
Private individual	Private with no confidential privilege	Defamatory statement only (malice is implied or imputed)	Ordinary Calero v. Del Chemical 68 Wis.2d 487, 500	Express malice Dalton v. Meister 52 Wis.2d 173, 179, Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Private with nonconstitutional conditional privilege	Defamatory statement and abuse of privilege Ranous v. Hughes, 30 Wis.2d 452, 468	Ordinary, Calero, supra at 500	Express malice Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, p. 183	Negligence Gertz v. Robert Welsh, Inc., 418 U.S. 323, 347, held that states establish the standard of liability; Denny v. Mertz, 106 Wis.2d 636, 654 established the negligence standard	Ordinary	Actual malice Denny, supra at 659 Gertz, supra at 350	Middle - Wangen, supra at 300
Public figure	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, supra at 183	Actual malice New York Times v. Sullivan, 376 U.S. 254, 279-280 Calero, supra at 500 Polzin v. Helmbrecht, 54 Wis.2d 578, 587-588	Middle Calero, supra at 500	Express malice Polzin, supra at 588	Middle - Wangen, supra at 300

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DEFAMATION SERIES

The following list shows the instructions on substantive law and damages included in this defamation series.

2501 Defamation: Private Individual Versus Private Individual, No Privilege
2505 Defamation: Truth as a Defense (Nonmedia Defendant)
2505A Defamation: Truth of Statement (First Amendment Cases)
2507 Defamation: Private Individual Versus Private Individual with Conditional Privilege
2509 Defamation: Private Individual Versus Media Defendant (Negligent Standard)
2510 Defamation: Truth as Defense Where Plaintiff Charged with Commission of a Crime
2511 Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice)
2512 Defamation: Truth as Defense Where Plaintiff Not Charged with Commission of a Crime
2513 Defamation: Express Malice
2514 Defamation: Effect of Defamatory Statement or Publication
2516 Defamation: Compensatory Damages
2517 Defamation: Conditional Privilege: Abuse of Privilege
2517.5 Defamation: Public Official: Abuse of Privilege
2518 Defamation: Express Malice
2520 Defamation: Punitive Damages

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2501 DEFAMATION: PRIVATE INDIVIDUAL VERSUS PRIVATE INDIVIDUAL, NO PRIVILEGE

Question 3 (2) asks whether the statement made (published) by (defendant) was defamatory.

A defamatory statement is one which: (1) is false, (2) is communicated (by speech) (by conduct) (in writing) to a third person, and (3) tends so to harm the reputation of another as to lower the person in the estimation of the community or deters others from associating or dealing with the person.

The action of defamation is based upon the principle that a person's reputation and good name is of great value. Once such reputation and good name have been damaged by statements of another person, restoration is virtually impossible.

It is not necessary that the defamatory statement be communicated to a large or even a substantial number of persons. It is enough if it is communicated to a single person other than the one defamed. Nor is it necessary that the statement be made (published) with the intention to defame, for the intention of the speaker (author) is not material.

In determining whether (defendant) made or published a defamatory statement, you should consider the whole context of the communication, giving the particular words of defamation their natural and ordinary meaning.

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the statement made (published) by (defendant) was defamatory.

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(As to Question 4 (3), the damage question, give COMPENSATORY DAMAGES, WIS JI-CIVIL 2516, and BURDEN OF PROOF, ORDINARY, WIS JI-CIVIL 200.)

(As to Question 5 (4), express malice, give EXPRESS MALICE, WIS JI-CIVIL 2513.)

(As to Question 6 (5), punitive damages, give PUNITIVE DAMAGES, WIS JI-CIVIL 2520.)

(As to Questions 5 (4) and 6 (5), give BURDEN OF PROOF, MIDDLE, WIS JI-CIVIL 205.)

SPECIAL VERDICT - TRUTH OF THE STATEMENT RAISED AS A DEFENSE:

Question 1: Did (defendant) say (insert alleged statement, e.g., plaintiff is a thief)?

Answer: _____
Yes or No

Question 2: If you answered "yes" to Question 1, then answer this question: Was such statement substantially true?

Answer: _____
Yes or No

[Note: In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. __, 89 L.Ed.2d 783 (1986). At least in cases involving a media defendant, this holding changes Wisconsin common law which had placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661 n. 35, 318 N.W.2d 141 (1982). It is uncertain whether the holding by the court applies to all defamation claims or only to those where the defendant asserts a constitutional conditional

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privilege. The Court reserved this question. In this regard, special attention should be given to footnote 4 of the decision and the concurrence of Justices Brennan and Blackmun. The footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.]

Question 3: If you answered "no" to Question 2, then answer this question: Was such statement defamatory?

Answer: _____
Yes or No

Question 4: If you answered "yes" to Question 3, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $_____

Question 5: If you answered "yes" to Question 3, then answer this question: Did (defendant) act with express malice in making (publishing) the defamatory statement?

Answer: _____
Yes or No

Question 6: If you answered "yes" to Question 5, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $_____

SPECIAL VERDICT - TRUTH OF THE STATEMENT NOT RAISED AS A DEFENSE:

Question 1: Did (defendant) say (insert alleged statement, e.g., plaintiff is a thief)?

Answer: _____
Yes or No

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Question 2: If you answered "yes" to Question 1, then answer this question: Was such statement defamatory?

Answer: _____
Yes or No

Question 3: If you answered "yes" to Question 2, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $_____

Question 4: If you answered "yes" to Question 2, then answer this question: Did (defendant) act with express malice in making (publishing) the defamatory statement?

Answer: _____
Yes or No

Question 5: If you answered "yes" to Question 4, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $_____

COMMENT

This instruction was originally approved in 1986 and revised in 1991. The comment was revised in 1987. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

Denny v. Mertz, 106 Wis.2d 636, 658, 318 N.W.2d 141 (1982); Martin v. Outboard Marine Corp. 15 Wis.2d 452, 462-63, 113 N.W.2d 135 (1962); Restatement, Second, Torts §§ 577, 558, 559 (1977).

See also Law Note, Wis JI-Civil 2500.

In all areas not protected by first amendment constitutional considerations, the burden of proof is the ordinary civil burden. Calero v. Del Chemical Corp. 68 Wis.2d 487, 500, 228 N.W.2d 737 (1975).

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2505 DEFAMATION: TRUTH AS A DEFENSE (NONMEDIA DEFENDANT)

(Defendant) claims that the statements (made) (published) are true (substantially true). Truth of a statement is a defense in a defamation action. In fact, it is enough if the statement (made) (published) is substantially true.

It is not necessary for (defendant) to establish the exact truth of the statement (made) (published). Slight inaccuracies of expression are immaterial provided that the statement is true in substance.

The burden of proof is upon (defendant) to establish the truth (substantial truth) of the statement.

COMMENT

This instruction was originally approved in 1986 and revised in 1988. The comment was revised in 1987, 2011, and 2014. This instruction should be used in defamation cases where no constitutional conditional privilege exists.

Denny v. Mertz, 106 Wis.2d 636, 661 n.35, 318 N.W.2d 141 (1982); DiMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973); Restatement, Second Torts § 581A (1965). See also Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.

In Lathan v. Journal Co., 30 Wis.2d 146, 151, 140 N.W.2d 417 (1966), the court established the decision-making format for a defamation action. It stated:

> In an action for libel the court must first determine whether the writing complained of is defamatory. If it is not, that ends the matter. In the event of defamation, the court must consider the defenses alleged. A matter, though defamatory, is still not actionable if it is true, since truth is a complete defense. Williams v. Journal Co. (1933), 211 Wis. 362, 370, 247 N.W. 435.

In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). This holding changes Wisconsin common law which had placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, supra. Philadelphia Newspapers, Inc. v. Hepps involved a constitutional conditional privilege. It is uncertain whether the holding by the U.S. Supreme Court

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applies to all defamation claims or only to those where the defendant asserts a constitutional conditional privilege. In fact, the Court reserved this question. In this regard, special attention should be given to footnote 4 of the decision and the concurrence of Justices Brennan and Blackmun. The footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.

In Denny v. Mertz, supra at 660-61 n.35, a 1982 decision, the Wisconsin Supreme Court reaffirmed earlier decisions which held that the defendant has the burden of proving as a defense the truthfulness of the alleged defamatory statement. The court strongly disagreed with cases from other jurisdictions that had put the burden of proving the falsity of the statement on the plaintiff. Following the decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), other jurisdictions held that the Gertz constitutional protections apply to both media and nonmedia defendants. Because the plaintiff, under Gertz, must establish "fault" on the part of the defendant, jurisdictions applying the constitutional protections to all defendants do not require the defendant to prove truthfulness as a defense and instead require the plaintiff to prove falsity. This major shift in evidentiary burden was strongly rejected by the Wisconsin Supreme Court in Denny v. Mertz, supra at 660-61, when it noted:

> The decision in Jacron (350 A.2d 688) also stated that "truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff." 350 A.2d at 698. We strongly disagree with this allocation of the burden of proving the truth of a statement and reaffirm the law of this state that if a defamation defendant relies on the truth of his statement to avoid liability, he must affirmatively prove such truthfulness as a defense, rather than forcing the plaintiff to prove that the statement is false. See, e.g., Schaefer, 77 Wis.2d at 125.

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2505A DEFAMATION: TRUTH OF STATEMENT (FIRST AMENDMENT CASES)

(Defendant) claims that the statements (made) (published) are true (substantially true). Truth of a statement is a defense in a defamation action. In fact, it is enough if the statement (made) (published) is substantially true.

The burden of proof is upon (plaintiff) to establish that the statement is false. If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.

COMMENT

This instruction and comment were approved in 1988.

See Comment, Wis JI-Civil 2505.

In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). This holding changes Wisconsin common law which had placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661n.35, 318 N.W.2d 141 (1982). Philadelphia Newspapers, Inc. v. Hepps involved a constitutional conditional privilege. It is uncertain whether the holding by the Court applies to all defamation claims or only to those where the defendant asserts a constitutional conditional privilege. In fact, the Court reserved this question. In this regard, special attention should be given to footnote 4 of the decision and the concurrence of Justices Brennan and Blackmun. The footnote indicates that the majority reserved the question whether its ruling applies also to defamation actions involving nonmedia defendants.

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2507 DEFAMATION: PRIVATE INDIVIDUAL VERSUS PRIVATE INDIVIDUAL WITH CONDITIONAL PRIVILEGE

(As to Question 1, give the definition of "defamation" from Wis JI-2501.)

Question 2 asks whether (defendant), in making (publishing) the statements about (plaintiff), abused (his) (her) privilege.

Under certain circumstances, a person has a privilege to make (publish) defamatory statements about another. However, the privilege does not protect the speaker (author) if it is abused.

In this case, (defendant) had the privilege of making (publishing) statements about (plaintiff) for the reason that (insert the purpose for which the court has determined a conditional privilege exists - e.g., advising a prospective employer about the work capabilities of a former employee). However, it is for you to determine whether (defendant)'s privilege to make (publish) statements about (plaintiff) was abused under the circumstances of this case.

(Select the appropriate paragraphs.)

[1. An abuse of (defendant)'s privilege occurred if (he) (she) at the time of making (publishing) the statements knew that such statements were false or made (published) them in reckless disregard as to the truth or falsity of them.

(Give that portion of Wis JI-Civil 2511 that deals with reckless disregard of the truth or falsity of defamatory statements.)]

[2. An abuse of privilege occurred if (defendant) made (published) the statements solely from spite or ill will. However, ill will or spite does not abuse the privilege if the statements were made for the purpose (insert purpose).]

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[3. An abuse of (defendant)'s privilege occurred if (defendant) made the statements (made publication of the statements available) to persons who had no interest in or connection to (insert purpose).

In some cases, the statements, to be effective, must be made at a time and place even though third persons are present and likely to overhear the statements. That does not constitute an abuse of the privilege. However, the privilege is abused if the statements are unnecessarily made in the presence of third persons even though the information is given to the party who is entitled to receive it.]

[4. An abuse of (defendant)'s privilege occurred if (he) (she) did not reasonably believe that the making (publishing) of the statements was necessary to accomplish the purpose for which the privilege was given, that is (insert purpose).]

[The facts and circumstances available to (defendant) at the time the statements were made (published) must have been sufficient to cause a person of reasonable caution and prudence to believe that the information, in its entirety, was necessary to accomplish the purpose for which the privilege was given.]

[5. An abuse of (defendant)'s privilege occurred if (he) (she) made (published) statements necessary for the purpose (insert purpose - e.g., (plaintiff)'s work habits to a prospective employer) and then made additional defamatory statements not necessary to accomplish that purpose.]

[6. If the (defendant) made (published) statements believed by (him) (her) to be true and then added statements known by (him) (her) to be false, the privilege would be abused.]

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(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) abused (his) (her) privilege in making (publishing) the statements.

(As to Question 3, the damage question, give COMPENSATORY DAMAGES, WIS JI-CIVIL 2516, and BURDEN OF PROOF: ORDINARY, WIS JI-CIVIL 200.)

(As to Question 4, express malice, give EXPRESS MALICE, WIS JI-CIVIL 2513, and BURDEN OF PROOF: MIDDLE, WIS JI-CIVIL 205.)

(As to Question 5, punitive damages, give PUNITIVE DAMAGES, WIS JI-CIVIL 2520.)

SPECIAL VERDICT: (Proof of falsity assumed)

Question 1: Were the statements made (published) by (defendant) defamatory?

Answer: _____

Yes or No

Question 2: If you answered "yes" to Question 1, then answer this question: In making (publishing) the statements, did (defendant) abuse (his) (her) privilege?

Answer: _____

Yes or No

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Question 3: If you answered "yes" to Question 2, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statements?

Answer: _____

Question 4: If you answered "yes" to Question 2, then answer this question: Did (defendant) act with express malice in making (publishing) the statements?

Answer: _____

Yes or No

Question 5: If you answered "yes" to Question 4, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: _____

COMMENT

This instruction was approved in 1986 and revised in 2002. The comment was updated in 2003 and 2020.

See Restatement, Second, Torts § 619 (1977).

Whether a privilege exists at all is a question for the court. If the facts are in dispute, the jury determines the issues of fact, and the court decides whether the facts found by the jury make the publication privileged.

The jury determines whether the defendant abused the privilege.

For occasions in which a conditional privilege would arise, see Restatement, Second, Torts §§ 594-598A, (1977).

In Ranous v. Hughes, 30 Wis.2d 452, 468, 141 N.W.2d 251 (1966), the supreme court listed the four conditions which constituted an abuse of conditional privilege under the Restatement rules. Since that time, the Restatement had changed the wording of the first abuse of privilege from:

> (1) The defendant either did not believe in the truth of the defamatory matter or, if believing the defamatory matter to be true had no reasonable grounds for so believing; . . . Ranous, at 468.

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to:

> (a) knows the matter to be false; or
> (b) acts in reckless disregard as to its truth or falsity." Restatement, Second, Torts § 600 (1977).

In addition, the Restatement, Second, Torts § 605A (1977), has added a fifth rule constituting an abuse of conditional privilege. See also Restatement, Second, Torts Appendix, § 605, p. 117, Reporter's Note.

The five occasions giving rise to abuse of conditional privilege, as stated in the Restatement, Second, Torts §§ 600, 603-605A (1977) are:

1. The defendant knew the matter to be false or acted in reckless disregard as to the truth or falsity.

2. The defamatory matter is published for some purpose other than for which the privilege is given.

3. The publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege.

4. The publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given.

5. The publication includes unprivileged matter as well as privileged matter.

Every person has a lawful right to act for the protection of his or her (own bodily security, property, business or profession). When so acting, a person has the privilege, if such privilege is not abused, of making statements about another which may later turn out to be false and defamatory without being subjected to liability for the making of such statements. This privilege, however, is a conditional privilege which, if abused, does not shield a defendant from the liability imposed upon one who makes false and defamatory statements about another. Also, a person has a right to act for the protection of a third person, when either the life or property of such third person is imperiled by a threatened serious crime. When so acting, a person has the privilege, if such privilege is not abused, of making statements which may later turn out to be false and defamatory without being subjected to liability for the making of such statements.

A person also has a lawful right to act with respect to a matter which affects an important public interest when such public interest requires the communication of defamatory matter to a public officer or private citizen.

Employee References: Statutory Privilege Under Wis. Stat. § 895.487(2) for Employers. Wisconsin courts have long recognized a common law conditional privilege that protects communications that enable a prospective employer to evaluate an employee's qualifications. See Hett v. Ploetz, 20 Wis.2d 55, 59, 121 N.W.2d 270 (1963). The Wisconsin legislature has also codified this privilege under Wis. Stat. § 895.487, which permits an employer to make statements about a former employee. This statute reads:

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> An employer who, on the request of an employee or a prospective employer of the employee, provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference. The presumption of good faith under this subsection may be rebutted only upon a showing by clear and convincing evidence that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of s. 111.322. (Emphasis added.)

In Gibson v. Overnite Transportation Company, 2003 WI App 210, ¶11, 267 Wis.2d 429, 671 N.W.2d 388 the employer/defendant argued that, to abuse the statutory privilege, statements by the employer must be made with actual malice, i.e. with knowledge of falsity or with reckless disregard for the truth. The court of appeals concluded that the Wisconsin Legislature intended to keep the same standard of malice as existed in the common law-express malice and, therefore, actual malice is not required. The court said:

> § 17. Our conclusion is further supported by the jury instructions. See **State v. Olson**, 175 Wis.2d 628, 642 n. 10, 498 N.W.2d 661 (1993) ("[W]hile jury instructions are not precedential, they are of persuasive authority."). Like Wis. Stat. § 895.487(2), Wis JI-Civil 2507 lists ways in which the jury can find that an employer abused its privilege to make statements about former employees. First, the jury may find that the defendant made the statements knowing that they were false or in reckless disregard as to the truth or falsity of them. This is actual malice. However, the jury may also find defamation where the defendant made statements solely from spite or ill will. This is express malice, which is what the jury found here. Actual malice is not required.

In this context, "express malicious" requires a "showing of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed." Gibson v. Overnite Transportation Company, supra, at ¶11.

In Hussain v. Ascension Sacred Heart – St. Mary's Hosp., No. 18-cv-00529-wmc, 2019 WL 5310677 (W.D. Wisc. October 21, 2019), the plaintiff appeared to argue that malice should be inferred from the mere fact that the "forever letter" evaluation drafted by his employer was overall negative. The court, however, concluded that such an argument "not only falls short of the legal standard for malice, it would also read out of existence any privilege extended in section 895.487(2)." Hussain, supra.

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2509 DEFAMATION: PRIVATE INDIVIDUAL VERSUS MEDIA DEFENDANT (NEGLIGENCE STANDARD)

(As to question 1, give the definition of "Defamation," from Wis. JI-Civil 2501.)

Question 2 asks whether (defendant) was negligent in making (publishing) the statement about (plaintiff). If you are satisfied from the credible evidence that (defendant) did not have a reasonable basis for making (publishing) the statement or did not use ordinary care in checking on the truth or falsity of the statement before making (publishing) it, then you will answer question 2 "yes."

Ordinary care is the degree of care which the great mass of mankind ordinary exercises under the same or similar circumstances. A person fails to use ordinary care when, without intending to do any wrong, he or she acts or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person or the person's property, or the person or property of another, to an unreasonable risk of injury or damage.

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) was negligent in making (publishing) the statement.

(As to question 3, the damage question, give Wis JI-Civil 2516.)

(As to question 4, actual malice, give the actual malice part of Wis JI-Civil 2511.)

(As to question 5, punitive damages, give Wis JI-Civil 2520.)

(As to question 3, burden of proof, give Wis JI-Civil 200.)

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(As to questions 4 and 5, actual malice and punitive damages, give Wis JI-Civil 205.)

SPECIAL VERDICT

Question 1: Was the statement made (published) by (defendant) (insert statement, e.g., John Jones took a bribe) defamatory:

ANSWER: _____
(yes or no)

Question 2: If you answered "yes" to question 1, then answer this question:

Was (defendant) negligent in making (publishing such statement?

ANSWER: _____
(yes or no)

Question 3: If you answered "yes" to question 2, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

ANSWER: $_____

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Question 4: If you answered "yes" to question 2, then answer this question:

Did (defendant) act with actual malice in making (publishing) such statement?

ANSWER: _____
(yes or no)

Question 5: If you answered "yes" to question 4, then answer this question:

What sum of money, if any, do you assess against (defendant) for punitive damages?

ANSWER: $_____

COMMENT

This instruction and comment were approved by the Committee in 1985. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The Wisconsin Supreme Court determined in Denny v. Mertz, 106 Wis.2d 636, 318 N.W.2d 141 (1982), that the requisite showing of "fault" be media defendant sued by a private plaintiff is negligence. See Law Note, Wis JI-Civil 2500, Defamation, pages 12-13.

In cases involving a private individual versus a media defendant, the plaintiff must prove actual malice to warrant an award of punitive damages. Gertz v. Robert Welch, Inc., 94 S.Ct. 2997, 3012 (1974); Denny v. Mertz, supra at 659.

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2510 DEFAMATION: TRUTH AS DEFENSE WHERE PLAINTIFF CHARGED WITH COMMISSION OF A CRIME

This instruction was withdrawn in 1986.

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2511 DEFAMATION: PUBLIC FIGURE VERSUS MEDIA DEFENDANT OR PRIVATE FIGURE WITH CONSTITUTIONAL PRIVILEGE (ACTUAL MALICE)

(As to question 1, give the definition of "Defamation," from Wis JI-Civil 2501.)

Because of protections afforded a defendant such as (defendant) under the First Amendment of the Constitution, (plaintiff) must prove that any defamatory statements made (published) by (defendant) were made (published) with actual malice.

Your answers to questions 2 and 3 of the verdict will determine whether (defendant) acted with actual malice in making (publishing) the alleged defamatory statements.

A person acts with actual malice when such person makes (publishes) a defamatory statement knowing that the statement is false or with reckless disregard of whether it is false or not.[1]

To find that (defendant) acted with reckless disregard of the truth or falsity of the statement, you must determine that (defendant) had serious doubts as to the truth of the statement or had a high degree of awareness that the statement was probably false.[2]

Reckless conduct is not measured by whether a reasonably prudent person would have made (published) the statement or would have investigated the facts more thoroughly before making (publishing) it.[3] It is not enough to show that (defendant) made (published) the statement from feelings of ill will or a desire to injure (plaintiff).[4] There must be sufficient evidence to permit the conclusion that (defendant) in fact entertained serious doubts as to the truth of the statement made (published). Making (publishing) a statement with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.[5]

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In the course of your deliberations, you need not accept as conclusive (defendant)'s testimony that (he) (she) believed the statement to be true or had no serious doubt as to the truth of the statement. You may consider such factors as whether there were obvious reasons for (defendant) to doubt the veracity of (his) (her) information or whether the statement is so inherently improbable that only a reckless person would have made (published) it.[6]

(Plaintiff) has the burden of proof to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (defendant) made (published) the statement knowing it was false or with reckless disregard of whether it was false or not.[7]

(As to question 4, the damage question, give Wis JI-Civil 2516.)

(As to question 5, express malice, give Wis JI-Civil 2513.)

(As to question 6, punitive damages, give Wis JI-Civil 2520.)

(As to questions 4, 5, and 6, give Wis JI-Civil 205.)

SPECIAL VERDICT

Question 1: Was the statement made (published) by (defendant) (insert statement, e.g., that John Jones took a bribe) defamatory?

Answer: _____
Yes or No

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Question 2: If you answered "yes" to question 1, answer this question:

Did (defendant) make (publish) such statement knowing that it was false?

Answer: _____
Yes or No

Question 3: If you answered "no" to question 2, answer this question:

Did (defendant) make (publish) such statement with reckless disregard of its truth or falsity?

Answer: _____
Yes or No

Question 4: If you answered "yes" to either of questions 2 or 3, answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $_____

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Question 5: If you answered "yes" to either of questions 2 or 3, answer this question:

Did (defendant) act with express malice in making (publishing) such statement?

Answer: _____
Yes or No

Question 6: If you answered "yes" to question 5, answer this question:

What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $_____

COMMENT

This instruction and comment were approved in 1986. Nonsubstantive editorial changes were made to the instruction in 1993. The comment was updated in 1997. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The question of whether a person is a limited purpose public figure is an issue left solely to the court to decide as a matter of law, not an issue of fact to be decided by the jury. Lewis v. Coursolle Broadcasting of Wisconsin, Inc., 127 Wis.2d 105, 110, 377 N.W.2d 166 (1985). The court of appeals has said, that while the ultimate question of whether a plaintiff is a limited purpose public figure is a question of law, material factual disputes on this issue can arise. These factual disputes are not to be left to the jury at trial but should

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be resolved by the trial court, after an evidentiary hearing solely on that issue. Bay View Packing Co. v. Taff, 198 Wis.2d 653, 543 N.W.2d 522 (Ct. App. 1995).

There is an obvious problem of proof when the case is based upon reckless disregard of whether the defamatory statement is false or not. This problem was recognized by the U.S. Supreme Court in St. Amant v. Thompson, 390 U.S. 727, 88 St. Ct. 1323 (1968):

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes or case law. 88 S. Ct. 1325.

NOTES

1. The term "actual malice" was defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and cited by Wisconsin in Polzin v. Helmbrecht, 54 Wis.2d 578 (1972), and Calero v. Del Chemical Corp., 68 Wis.2d 487 (1975). See also Wis JI-Civil 2500, Law Note.

2. Restatement, Second, Torts § 580A, Comment d (1977); Garrison v. State of Louisiana, 379 U.S. 64 (1964).

3. Restatement, Second, Torts § 580A, Comment d (1977); St. Amant v. Thompson, 390 U.S. 727 (1968).

4. Restatement, Second, Torts § 580A, Comment d (1977).

5. St. Amant, 88 S. Ct. 1325.

6. St. Amant, 88 S. Ct. 1326.

7. Calero, supra note 1, at 500.

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2512 DEFAMATION: TRUTH AS DEFENSE WHERE PLAINTIFF NOT CHARGED WITH COMMISSION OF A CRIME

This instruction was withdrawn in 1986.

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2513 DEFAMATION: EXPRESS MALICE

Express malice exists when a defamatory statement is made (published) concerning a person from motives of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed.

Express malice cannot be inferred solely from the fact that the statement was false and injurious to (plaintiff). In determining whether (defendant) acted with express malice in making (publishing) the statement, you will take into consideration the words used and all other facts and circumstances existing at the time the statement was made (published).

COMMENT

This instruction and comment were approved by the Committee in 1985. Nonsubstantive editorial changes were made to the instruction in 1993.

The definition of express malice as here used was adopted by the Wisconsin Supreme Court in Polzin v. Helmbrecht, 54 Wis.2d 578, 587-88, 196 N.W.2d 685 (1972), and approved in Calero v. Del Chemical Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975).

In Reed v. Keith, 99 Wis. 672, 675, 75 N.W 392 (1898), the supreme court held that the malice which must be proved to support an award of punitive damages could not be inferred solely from the fact that the words were false and injurious to the plaintiff. Express malice could be implied from that fact along with all other facts and circumstances, including inferences drawn from the utterance of slanderous words.

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2514 DEFAMATION: EFFECT OF DEFAMATORY STATEMENT OR PUBLICATION

This instruction was withdrawn in 1986.

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2516 DEFAMATION: COMPENSATORY DAMAGES

A person wronged by a defamatory statement is entitled to recover money damages. The measure of recovery is such sum as will compensate the person for the damages suffered as a result of the statement.

In arriving at your answer, you should consider whether (plaintiff) has suffered any humiliation, mental anguish, physical injury, and damage to (his) (her) reputation in the community where (his) (her) reputation is known. The plaintiff's reputation is presumed to have been good at the time the statement was made (published). However, in determining damages, you should consider all evidence that has been offered bearing on (his) (her) reputation in the community.

It is not required that (plaintiff) prove damages by any financial yardstick measuring in dollars and cents. Injury to reputation, good name, and feelings are not subject to mathematical calculations or certainty. [Further, it is not necessary for (plaintiff) to prove an actual out-of-pocket loss.]

[If special damages are proved, add the following paragraph:

With respect to your answer to subdivision (b), you will insert the amount of the actual financial loss sustained by (plaintiff), including loss of income, loss of employment opportunities, and loss or injury to (plaintiff)'s credit standing.]

COMMENT

This instruction and comment were approved by the Committee in 1985 and revised in 1991.

This instruction should be used in all libel cases and in slander per se cases. If the slander alleged is not slanderous per se, eliminate the last sentence of paragraph 3 which appears in brackets because special damages in such a case must be proved.

Wisconsin has adopted the Restatement, Second, Torts §§ 569 through 575 in defining the type of damages recoverable. If the defamatory statement is in the form of libel, it is actionable without

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alleging special damages. If the statement is in the form of slander, and is not slander per se, it is not actionable without alleging special damages. Slander per se imputes to another a criminal offense or a loathsome disease or a matter affecting plaintiff's business or sexual misconduct. Martin v. Outboard Marine Corp. 15 Wis.2d 452, 461, 113 N.W.2d 135 (1962); Dalton v. Meister, 52 Wis.2d 173, 179, 188 N.W.2d 494 (1971).

> Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.
>
> Gertz v. Robert Welch, Inc., 94 S.Ct. 2997, 3012 (1974); Denny v. Mertz, 106 Wis.2d 636, 659, 318 N.W.2d 141 (1982).

The burden of proof is the ordinary civil burden in all cases except those involving a public figure against a media defendant. In the latter type of case, the middle burden is required for recovery of compensatory damages. See matrix following Law Note for Trial Judges, Wis JI-Civil 2500.

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2517 DEFAMATION: CONDITIONAL PRIVILEGE: ABUSE OF PRIVILEGE

This instruction was revised and renumbered JI-Civil 2507 in 1986.

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2517.5 DEFAMATION: PUBLIC OFFICIAL: ABUSE OF PRIVILEGE

This instruction was revised and renumbered JI-Civil 2511 in 1986.

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2518 DEFAMATION: EXPRESS MALICE

This instruction was renumbered JI-Civil 2513 in 1986.

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2520 DEFAMATION: PUNITIVE DAMAGES

Punitive damages are not awarded to compensate (plaintiff) but are to punish (defendant) and to discourage and deter others from engaging in such conduct in the future. Punitive damages can only be assessed when a defendant, in making (publishing) a defamatory statement, was prompted by (express malice) (actual malice) toward a plaintiff.

(For express malice, give Wis JI-Civil 2513)

(For actual malice, give Wis JI-Civil 2511 (exclude paragraph 1))

Even if you find that (defendant) was prompted by (express malice) (actual malice) in making (publishing) the statement, you are not required to assess punitive damages. Whether you do or not is left to your sound judgment and discretion under these instructions and the evidence in this case.

(Plaintiff) must satisfy you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that punitive damages should be awarded.

If you believe that you should assess punitive damages against (defendant) by way of punishment and as a warning to others, then you should award such damages as you deem just and proper. Otherwise, you will insert the word "nothing" in answer to question ___.

During the course of this trial, evidence was offered and received as to the wealth and financial standing of (defendant). Such evidence has a bearing in this case only on question ___, relating to punitive damages, and is not to be considered by you in answer to question ___, relating to compensatory damages. If, in your sound judgment and discretion, you determine that this is a proper case in which to award punitive damages, you may consider

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evidence of the wealth of (defendant). Such evidence was admitted solely to aid you in determining what amount you should assess as punishment for the defamation.

You are further instructed that if you do not find any damages in your answer to question ___, then you must answer question ___ by inserting the word "nothing." Punitive damages cannot be awarded unless the jury awards compensatory damages.

COMMENT

This instruction and comment were approved by the Committee in 1985. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

Whether the plaintiff must prove express or actual malice to support an award of punitive damages depends on the identity of the parties. In the following cases, proof of express malice is required:

a. Private individual versus private individual with or without a conditional privilege. Dalton v. Meister, 52 Wis.2d 173, 179, 188 N.W.2d 494 (1971); Calero v. Del Chemical Corp., 68 Wis.2d 487, 506, 228 N.W.2d 737 (1975).

b. Public figure versus media defendant or private individual with constitutional privilege. Polzin v. Helmbrecht, 54 Wis.2d 578, 588, 196 N.W.2d 685 (1972).

In cases involving a private individual versus a media defendant, the plaintiff must proveactual malice to warrant an award of punitive damages. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3012; Denny v. Mertz, 106 Wis.2d 636, 659, 318 N.W.2d 141 (1982).

Wangen v. Ford Motor Co., 97 Wis.2d 260, 300, 294 N.W.2d 437 (1980), has set the standard of proof in all cases involving punitive damages as the middle burden of proof.

Evidence of a defendant's wealth and ability to pay is admissible and relevant in assessing punitive damages. Fahrenberg v. Tengel, 96 Wis.2d 211, 225, 291 N.W.2d 516 (1980); Wangen, supra at 304. But, where there are multiple defendants, see Comment, Wis JI-Civil 1707, Punitive Damages.

Compensatory damages must be awarded before punitive damages can be given. Widemshek v. Fale, 17 Wis.2d 337, 340, 117 N.W.2d 275 (1962); Bachand v. Connecticut Gen. Life Ins. Co., 101 Wis.2d 617, 633, 305 N.W.2d 149 (Ct. App. 1981). However, if the compensatory damages are nominal, that is - six cents, punitive damages cannot be awarded. Barnard v. Cohen, 165 Wis. 417, 162 N.W. 480 (1917); Wussow v. Commercial Mechanisms, Inc., 90 Wis.2d 136, 140, 279 N.W.2d 503 (Ct. App. 1979).

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2550 INVASION OF PRIVACY: PUBLICATION OF A PRIVATE MATTER: WIS. STAT. § 995.50(2)(c)

Every person in Wisconsin enjoys a right of privacy. In this case, the plaintiff, (_____), contends that (his) (her) right of privacy was violated by the defendant, (_____), publicizing a matter concerning (his) (her) private life, namely (here describe the alleged publication).

For (plaintiff) to establish that (his) (her) right of privacy was violated, (he) (she) must prove four separate elements:

1. (Defendant) made a public disclosure of true facts concerning (plaintiff) and that the facts were communicated either to the public at large or a sufficient number of persons to insure that the facts become a matter of public knowledge.

2. The facts disclosed must be private facts. The term "private facts" suggests that the subject matter concerns something that (plaintiff) would not ordinarily disclose to anybody but (his) (her) family or close personal friends. It does not include information about a person that is already available to the public as a matter of public record.

3. The private matter must be one that would be highly sensitive to a reasonable person of ordinary sensibilities. In this regard, you may consider the information disclosed about (plaintiff) in relation to the customs of the time and place where the disclosure was made, [(plaintiff)'s occupation], and the habits of neighbors and fellow citizens. Only if the facts disclosed are such that a reasonable person would be seriously aggrieved by their disclosure is this element satisfied.

4. (Defendant), in disclosing the facts, acted either recklessly or unreasonably in deciding that there was a legitimate public interest in knowing the facts disclosed, or

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(defendant) actually knew that the public had no legitimate interest in knowing the facts. If you conclude that the disclosure of the facts concerns a matter of legitimate public concern, then there is no invasion of privacy.

(Burden of Proof: Ordinary)

SPECIAL VERDICT

1. Did (defendant) violate (plaintiff)'s right of privacy by _____?

COMMENT

This instruction and comment were approved by the Committee in 1993. The instruction was revised in 2006. The comment was updated in 1995, 2006, 2009, 2014, and 2015.

This instruction addresses one of the four possible invasions of privacy set forth in Wis. Stat. § 995.50(2), namely § 995.50(2)(c). The four types of invasions are:

> (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.
>
> (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.
>
> (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.
>
> (d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct.

Public Disclosure. For a discussion of the "public disclosure" sufficient to support a claim under subsection (c), see Zinda, supra, p. 929; Hillman v. Columbia County, 164 Wis.2d 376, 395 n. 10, 474 N.W.2d 913 (Ct. App. 1991); Olson v. Red Cedar Clinic, 2004 WI App. 102, 273 Wis.2d 728, 681 N.W.2d 306. See also Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

In Pachowitz v. LeDoux, 2003 WI App 120, 265 Wis.2d 631, 666 N.W.2d 88, the court of appeals rejected the appellant's assertion that a disclosure of private information to one person can never constitute

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"publicity." Further, the court said it was not persuaded that the use of the term "persons" opposed to "person" in the 2003 version of this jury instruction requires a disclosure to more than one person. The court concluded "that disclosure of private information to one person or to a small group does not, as a matter of law in all cases, fail to satisfy the publicity element of an invasion of privacy claim. Rather, whether such a disclosure satisfies the publicity element depends upon the facts of the case and the nature of plaintiff's relationship to the audience who received the information. 2003 WI App, ¶ 19-25.

Privileges. Section 995.50(3) states that the right of privacy is to be interpreted in accordance with the "developing common law of privacy, including defenses of absolute and qualified privilege . . ." For the treatment of a conditional privilege, see Wis. JI-Civil 2507.

Section 995.50(2)(a) and (b) describe invasions of privacy which do not warrant a standard instruction in that the subject matter of these subparagraphs are self-explanatory and in most instances, liability under these two sections will be decided by one fact question which contains a description of the privacy invasion set out in the statute. For a claim under subsection (d), see Wis JI-Criminal 1396.

A quasi-judicial officer and court-appointed expert witness enjoy absolute immunity so long as the statements "bear a proper relationship to the issues." Snow v. Koeppl, 159 Wis.2d 77, 464 N.W.2d 215 (Ct. App. 1990).

Elements. The Committee believes that a claim based on a violation of § 995.50(2)(c), which is embodied in the foregoing instruction, requires a more detailed jury instruction in light of Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 440 N.W.2d 548 (1989), wherein our supreme court discusses the necessary elements to prove a cause of action under this subparagraph. See also Hillman v. Columbia County, 164 Wis.2d 376, 474 N.W.2d 913 (Ct. App. 1991).

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2551 INVASION OF PRIVACY: HIGHLY OFFENSIVE INTRUSION; WIS. STAT. § 995.50(2)(a)

(Plaintiff) claims that (defendant) (invaded) (his) (her) privacy by (insert intrusion). To prove this claim, (plaintiff) must prove the following three elements:

1. (Defendant) intentionally intruded upon the privacy of (plaintiff);
2. The intrusion by (defendant) was of a nature that would be highly offensive to a reasonable person; and
3. The intrusion was (in a place that a reasonable person would consider private) (or) (in a manner involving trespass).

(Definition of trespass; See Wis JI-Civil 8012)

(Burden of Proof: Middle; See Wis JI-Civil 205)

SPECIAL VERDICT

Did (defendant) violate (plaintiff)'s right to privacy by (_____)?

Answer:_____
Yes or No

COMMENT

Wis. Stat. § 995.50(2) states: In this section, "invasion of privacy" means any of the following:

> (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

This invasion of privacy consists of an intentional interference with the plaintiff's interest in solitude or seclusion, either as to his or her person or as to his or her private affairs or concerns, of a kind that is highly offensive. Restatement of Torts, Second, § 652B. The claim does not require a physical intrusion or publicity given to the person whose interest is invaded.

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Intentional Conduct. The following can be added to explain "intentional conduct":

> The requirement that (defendant) intended to intrude means that (defendant) had the mental purpose to intrude upon the privacy of (plaintiff) or was aware that (his) (her) conduct was practically certain to intrude upon the privacy of (plaintiff) (or another person).

Highly Offensive Intrusion. The following language can be added to the instruction to guide the jury in determining if the intrusion would be highly offensive to a reasonable person:

> In deciding whether an intrusion is highly offensive, among the things you may consider are:
>
> 1. The degree of intrusion,
> 2. The context, conduct, and circumstances of the intrusion,
> 3. (Defendant)'s motives or objectives,
> 4. The setting in which the intrusion occurred, and
> 5. How much privacy a reasonable person could expect in that setting

Trespass. If the intrusion is claimed to be a trespass, the following, taken from Wis JI-Civil 1812, can be added:

> A person who goes upon premises owned, occupied, or possessed by another, without consent, is a trespasser.

Privilege. Wis. Stat. § 995.50(3) provides the right of privacy recognized in the section should be interpreted in accordance with the "developing common law of privacy," including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.

Conduct. In Poston v. Burns, 2010 WI App 73, 325 Wis.2d 404, 784 N.W.2d 717, the court of appeals held that the recording of sounds from the plaintiffs' home using a common recording device placed inside the defendants' window was not an intrusion "of a nature highly offensive to a reasonable person."

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2552 INVASION OF PRIVACY: PUBLICATION OF A PRIVATE MATTER: CONDITIONAL PRIVILEGE

(Note: Inquire in question 1 whether the (plaintiff)'s right to privacy was violated. See suggested question at Wis JI-2550.)

Question 2 asks whether (defendant), in publicizing a matter concerning (plaintiff)'s private life, abused (his) (her) privilege.

Under certain circumstances, a person has a privilege to publicize a matter concerning the private life of another. However, the privilege does not protect the (defendant) if it is abused.

In this case, (defendant) had the privilege of publicizing a matter concerning (plaintiff)'s private life for the reason that (insert the purpose for which the court has determined a conditional privilege exists - e.g., employer advising other employees of reason of termination of plaintiff fellow employee). However, it is for you to determine whether (defendant)'s privilege to publicize a private matter about (plaintiff) was abused under the circumstances of this case.

(Select appropriate paragraphs.)

[1. An abuse of (defendant)'s privilege occurred if (he) (she) at the time of publicizing the private matter knew that such statements were false or publicized them in reckless disregard of their truth or falsity.

(Give that portion of Wis JI-Civil 2511 that deals with reckless disregard of truth or falsity in defamation, adapting it where necessary.)]

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[2. An abuse of privilege occurred if (defendant) publicized a private matter concerning the (plaintiff) solely from spite or ill will. However, ill will or spite does not abuse the privilege if the statements were made for the purpose (insert purpose for which court has determined a conditional privilege exists.)]

[3. An abuse of (defendant)'s privilege occurred if (defendant) publicized the private matter to persons who had no interest in or connection to (insert purpose).

In some cases, the statements, to be effective, must be made at a time and place where third persons are present and likely to overhear the statements. That does not constitute an abuse of the privilege. However, the privilege is abused if the statements are unnecessarily made in the presence of third persons even though the information is given to the party who is entitled to receive it.]

[4. An abuse of (defendant)'s privilege occurred if (he) (she) did not reasonably believe that publicizing the private matter was necessary to accomplish the purpose for which the privilege was given, that is (insert purpose).

The facts and circumstances available to (defendant) at the time the private matter was publicized must have been sufficient to cause a person of reasonable caution and prudence to believe that such action, in its entirety, was necessary to accomplish the purpose for which the privilege was given.]

[5. An abuse of (defendant)'s privilege occurred if (he) (she) publicized private matters necessary for the purpose (insert purpose) and then publicized additional private matters not necessary to accomplish that purpose.]

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[6. If the (defendant) publicized private matters believed by (him) (her) to be true and then added statements known by (him) (her) to be false, the privilege would be abused:]

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) abused (his) (her) privilege in publicizing the private matter.

SPECIAL VERDICT

Question 1: Did (defendant) violate (plaintiff)'s right of privacy by _____?

Answer:_____
Yes or No

Question 2: If you answered "yes" to question 1, then answer this question: Did (defendant) abuse (his) (her) privilege in publicizing a private matter concerning the (plaintiff)?

Answer:_____
Yes or No

COMMENT

This instruction and comment were approved in 1998. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is to be used with Wis JI-Civil 2550.

Wis. Stat. § 895.50(3) recognizes a defense of conditional privilege which "shall be interpreted in accordance with the developing common law of privacy, with due regard for maintaining freedom of communication, privately and through the public media." Also see Zinda v. Louisiana Pacific Corp., 149 Wis.2d 913, 931, 440 N.W.2d 548 (1989).

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Circumstances which give rise to conditional privilege for defamation claim can also apply to an invasion of privacy claim. Zinda, supra, citing Restatement, Second, Torts § 652G at 401.

Once it is determined by the court that a conditional privilege applies, the burden of proof shifts to the plaintiff to show abuse. Calero v. Del Chemical Corp., 68 Wis.2d 487, 499, 228 N.W.2d 737 (1975).

Abuse of a conditional privilege results in its loss. Ranous v. Hughes, 30 Wis.2d 452, 468, 141 N.W.2d 251 (1966). Five occasions giving rise to abuse of conditional privilege as stated in the Restatement, Second, Torts §§ 600 - 605A and adopted in Zinda, supra, at 925 are as follows: (1) The defendant knew the matter to be false or acted in reckless disregard as to the truth or falsity. (2) The defamatory matter is published for some purpose other than for which the privilege is given. (3) The publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege. (4) The publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given. (5) The publication includes unprivileged matter as well as privileged matter.

The jury determines whether the defendant abused the privilege unless the facts are such that only one conclusion can be reasonably drawn. Zinda, supra, at 926.

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2600 MALICIOUS PROSECUTION: INSTITUTING A CRIMINAL PROCEEDING

Question _____ asks did (defendant) maliciously prosecute (plaintiff).

To establish malicious prosecution, (plaintiff) must prove the following six elements:

1) A criminal proceeding was brought against (plaintiff).

2) (Defendant) was actively involved in instituting the criminal proceeding (prosecution) against (plaintiff).

3) The criminal proceeding was terminated in favor of (plaintiff).

4) (Defendant) acted with malice in instituting the criminal proceeding (prosecution).

5) The criminal charges were made without probable cause.

6) (Plaintiff) suffered damages as a result of the criminal proceeding (prosecution) on those charges.

The fourth element requires that (defendant) acted with malice in instituting the criminal proceeding (in causing the (prosecution)) (in causing charges to be brought). A person acts with malice when he or she has a hostile or vindictive motive, or acts primarily for a purpose other than bringing a guilty person to justice.

The fifth element relates to whether the charges made by (defendant) were without probable cause. This element is satisfied if, at the time (defendant) made the charges against (plaintiff), (defendant) knew or had reason to believe that (plaintiff) was not guilty of the charge(s). There is no probable cause if you are satisfied that (defendant) did not have sufficient facts concerning (plaintiff)'s conduct that would lead a person of ordinary caution and prudence to believe (plaintiff) had committed a criminal offense.

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It is not enough that (plaintiff) establish that (defendant) acted with malice in instituting the criminal proceeding (in causing the prosecution); (plaintiff) must also prove that (defendant) had no probable cause to make the charges.

SPECIAL VERDICT

Question 1: Did (defendant) maliciously prosecute (plaintiff)?

Answer: _____
(Yes or No)

Question 2: What sum of money will compensate (plaintiff) for [insert damages]?

Answer: $_____

COMMENT

The instruction and comment were initially approved by the Committee in 1966. The instruction and comment were revised in 1986, 1991, 2014, and 2015.

Elements. The six essential elements in an action for malicious prosecution are:

(1) a prior institution of judicial proceedings against the plaintiff;
(2) such former proceedings must have been put in motion by or at the instance of the defendant in the malicious prosecution action;
(3) such proceedings must have terminated in favor of the defendant in such criminal proceedings;
(4) malice in instituting the former proceedings;
(5) want of probable cause for instituting the former proceedings;
(6) damage.

See Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983); Elmer v. Chicago & N.W. Ry., 257 Wis. 228, 43 N.W.2d 244 (1950).

The first three elements may be determined by the court. Ordinarily, the first three elements do not arise in a malicious prosecution action, as they are generally established beyond question by the records in the criminal proceedings. Therefore, no special instruction is necessary on these elements.

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The fourth element, "malice in instituting the criminal proceedings," and the fifth element, lack of probable cause, are submitted in this instruction.

Instigation of Prior Proceedings. A party will be found to have instigated prior criminal proceedings against the present plaintiff if that party was instrumental in prosecuting the present plaintiff. Thus, the malicious swearing and signing of a criminal complaint can satisfy the instigation-of-prior-proceedings element for malicious prosecution. Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1952). But, no malicious prosecution action will lie where the defendant supplied the authorities with information and the prosecution was begun only after the authorities conducted their own independent investigation. Pollock v. Vilter Mfg. Corp., 23 Wis.2d 29, 126 N.W.2d 602 (1964).

Termination of Prior Criminal Actions. Dismissal of one count of a criminal complaint does not constitute favorable termination of the proceedings where the defendant in the prior action is convicted on another count arising out of the same incident. Heilgeist v. Chasser, 98 Wis.2d 97, 295 N.W.2d 26 (Ct. App. 1980).

Malice. The plaintiff must prove that the defendant acted "maliciously" in order to recover in a malicious prosecution suit. Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). While the voluntary dismissal of the prior proceeding may be used to establish the lack of probable cause for the prior action, a voluntary dismissal may not be used to infer the existence of malice. Id; Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967). There must be some independent evidence of conduct from which improper motives can be inferred. Id. Malice may be proven by showing "malice in fact" or "malice in law." Meyer, supra.

"Malice in fact" involves situations where the defendant acted chiefly from motives of ill will. Id. A willful and wanton disregard for the facts or law may provide a basis for malice in fact but such willful and wanton conduct must be of such a nature and character as to evince a hostile or vindictive motive. Id.

"Malice in law" may exist even when the defendant cannot be shown to have acted from motives of actual ill will or vindictiveness. Malice in law exists if evidence is presented from which the jury might infer that the defendant instigated the former proceedings for an improper motive or purpose, that is, for a primary purpose other than bringing an offender to justice. Meyer, supra; Yelk, supra. An example of malice in law is where a criminal prosecution is instituted for the purpose of collecting a debt or compelling the delivery of property. See Peters, supra.

Lack of Probable Cause for the Prior Proceedings. Lack of probable cause is an essential element for an action for malicious prosecution. Krieg v. Dayton-Hudson Corp., 104 Wis.2d 455, 311 N.W.2d 641 (1981). Probable cause is an objective standard measured by the reasonably prudent person's belief in the cause of action in light of the facts known or reasonably ascertainable. Id. However, probable cause for the prior action is not necessarily lacking where the present defendant acted without knowledge of all of the facts or acted negligently. See Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966).

For prior criminal proceedings, the court should not apply the state of mind of a prosecutor in determining whether a private party had probable cause to believe that another person committed a crime. Rather, the court should decide whether there was a quantum of evidence that would lead an ordinary and reasonable layman in the circumstances to believe that the present plaintiff committed a crime. Hajec v.

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Novitzke, 46 Wis.2d 402, 175 N.W.2d 193 (1970). Discharge of the present plaintiff in the prior criminal proceeding is prima facie evidence of want of probable cause. Id.

Advice of Counsel. Advice of counsel is an affirmative defense. If the defense of advice of counsel is in the case, then the Committee suggests that the trial judge submit that question to the jury first. In Elmer, supra, the court held that advice of counsel is a complete defense. This was affirmed in Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1953).

If full disclosure of all facts within the knowledge of the defendant was made to the district attorney or his lawyer for the purpose of obtaining legal guidance and the disclosure results in advice which is honestly followed in commencing the criminal proceedings, such proof constitutes a complete defense. The result is that one of the essential elements of malicious prosecution, i.e., want of probable cause, is negated and the entire malicious prosecution action fails. Also, in some instances, the determination of whether there has been such a full and fair disclosure is a matter of law and not properly for the jury. See Smith v. Federal Rubber Co., 170 Wis. 497, 175 N.W. 808 (1920).

Differences Between Abuse of Process and Malicious Prosecution. For a discussion of the differences between the tort of malicious prosecution and abuse of process, see Brownsell v. Klawitter, 102 Wis.2d 108, 306 N.W.2d 41 (1981), Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983), and Maniaci v. Marquette University, 50 Wis.2d 287, 184 N.W.2d 168 (1971).

Burden of Proof. The Committee believes the burden of proof to establish malicious prosecution is the middle burden. See Wis JI-Civil 205.

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2605 MALICIOUS PROSECUTION: INSTITUTING A CIVIL PROCEEDING

Question _____ asks: did (plaintiff) maliciously prosecute (defendant) [by instituting a civil proceeding].

To establish a malicious prosecution based on instituting a civil proceeding, (plaintiff) must prove the following six elements:

1) A judicial proceeding was (brought) (continued) against (plaintiff). [Insert type of civil proceeding] is a judicial proceeding.

2) The proceeding was (brought) (continued) by, or at the instance of, (defendant).

3) The proceeding was terminated in favor of (plaintiff).

4) (Defendant) acted with malice in instituting the proceedings.

5) The proceeding was instituted without probable cause.

6) (Plaintiff) suffered damages as a result of the proceeding.

The third element requires that the proceeding was terminated in favor of (plaintiff). [A voluntary compromise or settlement of the prior suit does not satisfy this element.]

The fourth element requires that (defendant) acted with malice in instituting the proceeding. A proceeding is maliciously instituted when a person who brings the proceeding has a hostile or vindictive motive or when the person's primary purpose was something other than succeeding on the merits of the claim.

The fifth element relates to whether the proceeding instituted by (defendant) was without probable cause. This element is satisfied if, at the time (defendant) initiated the proceeding against (plaintiff), (defendant) knew or had reason to believe that (plaintiff) was

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not [insert facts necessary to establish probable cause]. There is no probable cause if you are satisfied (defendant) did not have sufficient facts concerning (plaintiff)'s conduct that would lead a person of ordinary caution and prudence to believe (plaintiff) [insert facts establishing a claim.]

The sixth element requires that (plaintiff) suffered damages as a result of the proceeding.

SPECIAL VERDICT

Question 1: Did (defendant) maliciously prosecute (plaintiff)?

ANSWER: _____

(Yes or No)

Question 2: What sum of money will compensate (plaintiff) for [insert damages]?

ANSWER: _____

COMMENT

This instruction and comment were approved in 2015.

See also Comment to Wis JI-Civil 2600.

Institution of a Prior Civil Action. In Wisconsin, the unjustified institution of a prior criminal or civil action may provide a valid claim for malicious prosecution as long as the other five elements of malicious prosecution are present. Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983); Maniaci v. Marquette Univ., 50 Wis.2d 287, 184 N.W.2d 168 (1970).

Termination of Prior Action in Present Plaintiff's Favor. The prior civil action is terminated in the present plaintiff's favor when the prior action results in a defense verdict or dismissal on the merits with prejudice. However, the voluntary compromise and settlement of a prior civil suit does not satisfy the "favorable termination" element and, thus, bars a subsequent malicious prosecution suit. Thompson v.

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Beecham, 72 Wis. 2d 356 (1976); Tower Special Facilities, Inc. v. Investment Club, Inc., 104 Wis.2d 221 (Ct. App. 1981). Similarly, termination of the prior proceeding by some act, trick, or device of the present defendant does not constitute a "favorable termination." See Bristol v. Eckhardt, 254 Wis. 297 (1948); Schwartz v. Schwartz, 206 Wis. 420 (1932) (no bar to malicious prosecution suit where settlement of prior action induced by duress).

Malice. The plaintiff must prove that the defendant acted "maliciously" to recover in a malicious prosecution suit. Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). While the voluntary dismissal of the prior proceeding may be used to establish the lack of probable cause for the prior action, the voluntary dismissal may not be used to infer the existence of malice. Id; Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967). There must be some independent evidence of conduct from which improper motives can be inferred. Id. Malice may be proven by showing "malice in fact" or "malice in law." Meyer, supra.

"Malice in fact" involves situations where the defendant acted chiefly from motives of ill will. Id. A willful and wanton disregard for the facts or law may provide a basis for malice in fact but such willful and wanton conduct must be of such a nature and character as to evince a hostile or vindictive motive. Id.

"Malice in law" may exist even when the defendant cannot be shown to have acted from motives of actual ill will or vindictiveness. Malice in law exists if evidence is presented from which the jury might infer that the defendant instigated the former proceedings for an improper motive or purpose, that is, for a primary purpose other than bringing an offender to justice. Meyer, supra; Yelk, supra. An example of malice in law is where a criminal prosecution is instituted for the purpose of collecting a debt or compelling the delivery of property. See Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1953).

Lack of Probable Cause for the Prior Civil Proceedings. Lack of probable cause is an essential element for an action for malicious prosecution. Krieg v. Dayton-Hudson Corp., 104 Wis.2d 455, 311 N.W.2d 641 (1981). Probable cause is an objective standard measured by the reasonably prudent person's belief in the cause of action in light of the facts known or reasonably ascertainable. Id. However, probable cause for the prior action is not necessarily lacking where the present defendant acted without knowledge of all of the facts or acted negligently. See Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966).

Probable cause may be lacking with respect to prior civil proceedings where the party initiating the prior proceedings acted without a reasonable belief in the existence of the facts underlying the claim or did not reasonably believe that such facts state a valid claim. Neumann, supra. Generally, for purposes of a malicious prosecution action, no inference of want of probable cause arises from the dismissal of the prior civil proceeding. Novick v. Becker, 4 Wis.2d 432, 90 N.W.2d 620 (1958). However, the dismissal of an involuntary bankruptcy petition or insanity proceeding is prima facie evidence of lack of probable cause because these actions "stand in the same class as a criminal case." Neumann, supra.

Advice of Counsel. See Wis JI-Civil 2611.

Damages. For malicious prosecution suits involving prior civil proceedings, Wisconsin adheres to the minority "English" rule that the plaintiff must plead and prove special damages. Krieg, supra; Schier v. Denny, 9 Wis.2d 340 (1960); Johnson v. Calado, 159 Wis.2d 446; 464 N.W.2d 647 (1991). "Special damages" are injuries in the nature of an interference with the person or property of the present plaintiff by

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the prior action. See Schier, supra, Myhre v. Hessey, 242 Wis. 638, 9 N.W.2d 106 (1943). Special damages are present where the present plaintiff has been subjected to a wrongfully brought garnishment action (Novick, supra) or a wrongful winding up of a partnership which interfered with the plaintiff's possession and use of property (Luby v. Bennett, 111 Wis. 613 (1901)).

An allegation that the present plaintiff incurred expenses in defending himself against the prior proceeding fails to allege special damages. See Myhre, supra. In Schier, supra, the Wisconsin Supreme Court concluded that the plaintiff's claims of business reputation damage, mental anguish, public ridicule, humiliation, embarrassment, and attorney fees failed to allege such interference with the plaintiff's person or property as to amount to special damages.

Burden of Proof. The committee believes the burden of proof to establish malicious prosecution is the middle burden. See Wis JI-Civil 205.

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2610 MALICIOUS PROSECUTION: ADVICE OF COUNSEL: AFFIRMATIVE DEFENSE (CRIMINAL PROCEEDING)

(Defendant), contends that prior to instituting a criminal prosecution against (plaintiff), (he) (she) made a full and fair disclosure to (the district attorney) ([his] [her] own lawyer) of the material facts within (his) (her) knowledge which relate to (plaintiff)'s alleged commission of the criminal offense of _____.

The term "full and fair disclosure of the material facts within the knowledge of (defendant)," does not necessarily mean all the facts discoverable, but rather all the facts within the knowledge of the person making the statements. If (defendant) knew facts, either personally or in reliance upon credible information, and fully and fairly stated them to (the district attorney) ([his] [her] own lawyer), and honestly acted upon the advice given (him) (her) in commencing the criminal proceedings, it can then be said that (defendant) had probable cause or good reason to press criminal charges.

(Defendant) has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that, prior to (instituting) (pursuing) (continuing) (assisting) a criminal prosecution, (defendant) did make a full and fair disclosure to (the district attorney) ([his] [her] own lawyer) of all material information possessed by (him) (her) in relation to the alleged criminal offense and honestly followed the advice of (the district attorney) ([his] [her] own lawyer).

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SPECIAL VERDICT

Question 1: Before (instituting) (assisting in) (continuing) (pursuing) criminal charges against (plaintiff), did (defendant) make a full and fair disclosure of facts to (the district attorney) ([his] [her] own attorney)?

ANSWER: _____
(yes or no)

If you answered no to Question 1, then answer this question:

Question 2: Did (defendant) maliciously prosecute (plaintiff)?

ANSWER: _____
(yes or no)

Question 3: What sum of money will compensate (plaintiff) for [insert damages]?

ANSWER: _____

COMMENT

The instruction and comment were initially approved by the Committee in 1962. The instruction was revised in 1986, 1991, 2002, and 2015.

If this defense is raised and proved, then it negates lack of probable cause and is, therefore, a complete defense to the lawsuit. See Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). If the defendant raises advice of counsel as a defense, then this question should be submitted to the jury before asking whether the defendant has maliciously prosecuted the plaintiff.

Reliance on Advice of Counsel. The advice of an attorney whom a client has no reason to believe to be personally interested is conclusive evidence of the existence of probable cause for initiating a prior proceeding in reliance upon such advice when it is sought in good faith and given after a full disclosure of the facts within the client's knowledge and information. Meyer, supra; Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966). A "fair and full disclosure" does not mean disclosure of all discoverable facts but disclosure of all of the facts within the knowledge of the person making the statement. Neumann, supra. This knowledge may be based upon personal observation or upon credible information. Id.

Burden of Proof. The burden of proof to establish the affirmative defense is the lower civil burden.

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2611 MALICIOUS PROSECUTION: ADVICE OF COUNSEL: AFFIRMATIVE DEFENSE (CIVIL PROCEEDING)

(Defendant) contends that prior to commencing a civil proceeding against (plaintiff), (he) (she) made a full and fair disclosure to ([his] [her] lawyer) of all the material facts within (his) (her) knowledge which relate to the civil proceeding.

The term "full and fair disclosure of all of the material facts within the knowledge of the defendant," does not necessarily mean all the facts discoverable, but rather all the facts within the knowledge of the person making the statements. If (defendant) knew facts, either personally or in reliance upon credible information, and fully and fairly stated them to ([his] [her] lawyer), and honestly acted upon the advice given (him) (her) in commencing the civil proceedings, it can then be said that (defendant) had probable cause or good reason to start the civil proceeding.

(Defendant) has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that, prior to starting the civil proceeding, (defendant) made a full and fair disclosure to ([his] [her] lawyer) of all material information possessed by (him) (her) in relation to the civil proceeding and honestly followed the advice of ([his] [her] lawyer).

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SPECIAL VERDICT

Question 1: Before commencing the civil proceeding against (plaintiff), did (defendant) make a full and fair disclosure of facts to ([his] [her] attorney) and honestly follow the advice of the attorney?

ANSWER: _____
(yes or no)

If you answered no to Question 1, then answer this question:

Question 2: Did (defendant) maliciously prosecute (plaintiff)?

ANSWER: _____
(yes or no)

Question 3: What sum of money will compensate (plaintiff) for [insert damages]?

ANSWER: _____

COMMENT

The instruction and comment were approved in 2015.

If this defense is raised and proved, it negates lack of probable cause and is, therefore, a complete defense to the lawsuit. If the defendant raises advice of counsel as a defense, this question should be submitted to the jury before asking whether the defendant has maliciously prosecuted the plaintiff.

Reliance on advice of Counsel. The advice of an attorney whom a client has no reason to believe to be personally interested is conclusive evidence of the existence of probable cause for initiating a prior proceeding in reliance upon such advice when it is sought in good faith and given after a full disclosure of the facts within the client's knowledge and information. Meyer v. Ewald, 66 Wis.2d 168 (1974); Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966). A "fair and full disclosure" does not mean disclosure of all discoverable facts but disclosure of all of the facts within the knowledge of the person making the statement. Neumann, supra. This knowledge may be based upon personal observation or upon credible information. Id.

Burden of Proof. The burden of proof to establish the affirmative defense is the lower civil burden.

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2620 ABUSE OF PROCESS

An abuse of process occurs when a person uses a legal process against another primarily to accomplish a purpose for which it is not designed. In this case, (defendant) (state the legal process used, e.g., caused a subpoena to be issued to plaintiff; commenced an involuntary commitment proceeding against plaintiff; etc.) The purpose of (a subpoena)(involuntary commitment proceeding) is (state purpose).

To establish an abuse of process, (plaintiff) must prove that:

1. (Defendant) had a purpose other than that which the process was designed to accomplish; and

2. (Defendant) subsequently misused the process to accomplish a purpose other than that it was designed to accomplish.

Both elements must be proved to establish an abuse of process. The process must be used for something more than a proper use with a bad motive.

SPECIAL VERDICT

1. Did (defendant) engage in an act of abuse of process in (state process used) against (plaintiff)?

Answer: _____
Yes or No

2. If you answered "yes" to question 1, answer this question:

Did the use of (state process used) cause (plaintiff) damages?

Answer: _____
Yes or No

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3. If you answered "yes" to question 2, answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) damages?

$_____

COMMENT

This instruction and comment were approved by the Committee in 1994 and revised in 2012.

Definition. "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement, 3 Torts 2d, p. 474, sec. 682. Adopted in Brownsell v. Klawitter, 102 Wis. 2d 108, 114, 306 N.W.2d 41 (1981).

". . . : it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Restatement, 3 Torts 2d, p. 474, sec. 682.

Elements. There are two elements of the tort. (1) A purpose other than that which the process was designed to accomplish and (2) a subsequent misuse of the process. Thompson v. Beecham, 72 Wis. 2d 356, 362 (1976); Strid v. Converse, 111 Wis. 2d 418, 427, 331 N.W.2d 350 (1983). Both elements must be met in order to establish an abuse of process. The process must be used for something more than a proper use with a bad motive. The improper purpose must also culminate in an actual misuse of the process to obtain some collateral or ulterior advantage. In Schmit v. Klumpyan, 2003 WI App 107, 264 Wis.2d 414, 663 N.W.2d 331, the court of appeals held that the second element requires a showing that the process was used to obtain a collateral advantage:

> A key component of the second element is the requirement that the process be used to obtain a collateral advantage, an advantage that is "not a benefit to the suitor that the process was designed to secure." The attempt to obtain a collateral advantage is an important component because the tort is characterized as an attempt to use process as a means of extortion. An early decision of the Wisconsin Supreme Court clarifies that the inquiry is "whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he would not legally be compelled to do."

General. Abuse of process is broader than malicious prosecution and may provide a remedy where malicious prosecution will not. Malice, want of probable cause, and termination in the plaintiff's favor are not required in an abuse of process claim. Strid, supra at 426.

"Abuse of process lies even in those instances where legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it is not designed. The gist of the tort is misuse or misapplying process justified

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in itself for an end other than that which it was destined to accomplish. The purpose for which the process is used. . . is the only thing of importance." Maniaci v. Marquette University, 50 Wis. 2d 287, 299-300, 184 N.W.2d 168 (1971) .

An action for abuse of process may be the subject of counterclaim since proof of termination of the underlying proceedings is not required. Brownsell v. Klawitter, supra at 115. However, if the cause of action for abuse of process is based upon lack of probable cause, then termination of the proceedings is necessary to establish the absence of probable cause. Brownsell, supra at 116; Badger Cab Co. v. Soule, 171 Wis. 2d 754, 767-68, 492 N.W.2d 375 (Ct. App. 1992)

Burden of Proof. The committee believes the burden of proof to show abuse of process is the middle burden. See Wis JI-Civil 205.

Lawyer Immunity. The Wisconsin Supreme Court has recognized that an attorney who is acting in a professional capacity has qualified rather than absolute civil immunity. Nevertheless, the immunity does not apply when the attorney acts in a malicious, fraudulent, or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled. Strid, supra at 429-30.

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2720 HOME IMPROVEMENT PRACTICES ACT VIOLATION; WISCONSIN ADMINISTRATIVE CODE CHAPTER ATCP 110; WIS. STAT. § 100.20

Wisconsin has administrative rules known as the Home Improvement Practices Act. This act prohibits persons engaged in the business of making or selling home improvements from engaging in unfair methods of competition or unfair trade practices including [insert each specific prohibited conduct from Wis. Admin. Code Ch. ATCP 110.02 alleged by (plaintiff), for example (for a detailed list of examples, see Comment):

(• Making any false, deceptive or misleading representation to induce a person to enter into a home improvement contract;)

(• Soliciting or accepting payment for home improvement material or services which the seller does not intend to provide according to the terms of the contract)]

In this case, (insert project) is a home improvement.

Question _____ asks: (insert question based on prohibited conduct, e.g. Did (_____) made a false, deceptive, or misleading representation to induce (_____) to enter into the home improvement contract?)

(Insert explanation(s) of the prohibited conduct alleged by (plaintiff) e.g. definition of "false, deceptive, or misleading representation"; "soliciting.")

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VERDICT

1. Did (defendant) make a false, deceptive, or misleading representation to induce (plaintiff) to enter into the home improvement contract?

Answer: _____
Yes or No

If you answered question 1 "yes," answer question 2. If you answered question 1 "no," go to question 3.

2. Did (plaintiff) suffer a monetary loss because of the false, deceptive, or misleading representation?

Answer: _____
Yes or No

3. Did (defendant) solicit or accept payment for a home improvement material or service which (he) (she) did not plan to provide according to the terms of the home improvement contract?

Answer: _____
Yes or No

If you answered this question "yes," answer question 4. If you answered question 3 "no," go to question 5.

4. Did (plaintiff) suffer a monetary loss because of the solicitation or acceptance of payment?

Answer: _____
Yes or No

If you answered question Nos. 2 or 4, "yes," answer question 5, otherwise, do not answer it.

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5. What sum of money will fairly and reasonably compensate (plaintiff) for damages suffered because of (defendant)'s actions? $ _____

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2012.

The Home Improvement Practices Act lists 11 categories of prohibited practices. The instruction and verdict will need to be adapted to explain the alleged conduct described in the subsections of ATCP 110.02.

Definitions. "Home improvement" and "home improvement contract" are defined at Wis. Admin. Code ATCP § 110.01(2)

Prohibited Acts. ATCP 110.02 prohibits a seller from making any false, deceptive or misleading representation in order to:

- Get a buyer to enter into a home improvement contract.
- Obtain or keep any payment under a home improvement contract.
- Delay performance under a home improvement contract.

ATCP 110 also prohibits a seller from engaging in a number of specific practices, such as:

- Misrepresenting that the buyer's home will be used as a "model" or "advertising job."
- Misrepresenting that products or materials meet certain standards or specifications.
- Misrepresenting that the buyer's home contains a defective or dangerous condition requiring repair.
- Engaging in "bait and switch" sales tactics.
- Misrepresenting the seller's identify, status or affiliation.
- Misrepresenting that the seller is licensed, bonded or insured. If a seller claims to be licensed, bonded or insured, the seller must provide the buyer with a written statement describing the type of license, bond or insurance that the seller possesses.
- Advertising any free, gift or bonus offer without specifying the terms and conditions of that offer.
- Misrepresenting that the buyer is getting a special price or offer because of a closeout, factory sale, survey, leftover materials or other specific circumstances.
- Misrepresenting the contract price or other contract terms and obligations.
- Pressuring a buyer into a home improvement contract by delivering materials or starting work before the buyer has entered into a contract.
- Making false statements about a competitor, or the competitor's products or services.
- Misrepresenting that a home improvement contract will aid any charity or other organization.
- Encouraging the buyer to misrepresent the buyer's financial condition in order to obtain financing.
- Falsifying the contract price, or encouraging the buyer to falsify the contract price, in order to obtain financing.
- Asking the buyer to sign a completion slip or make final payment before the job is completed.

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For a complete list of prohibited practices, see Wis. Ad. Code ATCP § 110.02(1)-(11).

Who May Sue under HIPA? "Buyer" means either of the following persons who is a party or prospective party to a home improvement contract:

(a) The owner of residential or noncommercial property to which the home improvement contract pertains.

(b) The tenant or lessee of residential or noncommercial property to which the home improvement contract pertains if the tenant or lessee is or will be obligated to make a payment under the home improvement contract. Wis. Admin. Code DATCP § 110.01(3)

Who Can Be Sued under HIPA? Individuals personally liable under the definition of "seller" in Wis. Admin. Code § ATCP 110.01(5) include "person[s] engaged in the business of making or selling home improvements and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees."

Formulating a Verdict. First, the verdict should contain a "yes or no" question for each of the alleged HIPA violations; and there could be several complained about under the same contract. Second, for each of the "yes" answers, the verdict should ask a separate "cause" question, such as, "did the plaintiff suffer a monetary loss as a result of the violation," or did the defendant's violation "cause" plaintiff to suffer a monetary loss. Third, ask a damage question.

Damages. Violation of administrative code regulations for trade practices allow plaintiffs suffering pecuniary loss to seek damages as set forth in Wis. Stat. § 100.20(5), including double damages and attorney fees. Wisconsin case law holds that these "pecuniary losses" as defined in Wis. Stat. § 100.20(5) are contractual in nature. Benkoski v. Flood, 2001 WI App 84, ¶¶ 26, 32, 242 Wis. 2d 652, 626 N.W.2d 851.

In Benkoski, the plaintiff sued under ATCP 125 (another administrative code enabled under Wis. Stat. § 100.20(5)) to curb unfair trade practices relating to the sale of a mobile home. In concluding that the damages were contractual in nature, the trial court stated:

> Although this is not a contract case, we find additional support for our holding in the law of contracts. [The defendant's] ***unfair trade practices*** thwarting [the plaintiff's] potential sale caused damages akin to those caused by a breach of contract. WISCONSIN JI-CIVIL 3735, entitled "Damages: Loss of Expectation" states,
>
> > [t]he measure of damages for a breach of contract is the amount which will compensate the plaintiff for the loss suffered because of the breach. A party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the contract been performed.
> >
> > We conclude that the "***pecuniary loss***" concept set out in Wis. Stat. § 100.20(5) is ***similar to*** this concept of ***damages set out in the law of contracts***.
>
> Benkoski, 2001 WI App 84, ¶ 32

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In instructing the jury on damages, the trial court can include the following explanation which is a modified version of Wisconsin JI-Civil 3735, entitled "Damages: Loss of Expectation:

> **Damages: Loss of Expectation (JI-Civil 3735 as modified for Home Improvement Act Violations under Wis. Stat. § 100.20(5)):**
>
> The measure of damages for violations of the Home Improvement Act is the amount which will compensate the plaintiff for the loss suffered because of the violation. A party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the violation not occurred. The fundamental basis for an award of damages for a violation is just compensation for losses necessarily flowing from the violation.
>
> A party seeking to enforce a Home Improvement Act violation is not entitled to be placed in a better position because of the violation than that party would have been had the violation not occurred. The injured party is entitled to the benefit of his or her agreement, which is the net gain he or she would have realized from the contract but for the Home Improvement Act violation by the other party.

This instruction is consistent with contractual approach to measure damages in an ATCP violation.

In Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 22, 308 Wis.2d 103, 746 N.W.2d 762, the plaintiff sued for both negligence and violation of HIPA. The jury apportioned total damages of $96,000, 75% to negligence and 25% to the HIPA violation. The supreme court held that the entire $96,000 in damages should be doubled. Specifically, the supreme court said:

> ¶21, we hold that the HIPA should be applied to require the petitioners to pay double damages on the Stuarts' entire pecuniary loss, even though the Stuarts alleged other, non-HIPA, claims. While the HIPA is silent on whether the doubling of damages applies to the entire amount of the pecuniary loss when other conduct by the contractor contributes to the loss, remedial statutes must be liberally construed to advance the remedy that the legislature intended to be afforded. Benkoski v. Flood, 2001 WI App 84, 242 Wis.2d 652, 626 N.W.2d 851.

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2722 THEFT BY CONTRACTOR (Wis. Stat. § 779.02(5))[1]

Theft by contractor, as defined in § 779.02(5) of the Wisconsin Construction Lien Law is committed by one who, under an agreement for the improvement of land, receives money from the owner, and who, without consent of the owner, contrary to his or her authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims are paid [in full] [proportionally in case of a deficiency].[2]

To sustain a claim based on theft by contractor, the plaintiff must prove the following elements:

First, (Defendant) entered into an oral or written agreement for the improvement of land. (Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an improvement of land.

Second, (Defendant) received money from the owner under the agreement for the improvement of land. ["Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.[3]]

Third, (Defendant) intentionally used part or all of the money for a purpose other than the payment of claims due or to become due from (Defendant) for labor or materials used in the improvements before all claims were paid [in full] [proportionally in case of a deficiency].[4]

Fourth, the use of the money was without the consent of the owner of the land and contrary to (Defendant)'s authority.

Fifth, (Plaintiff) suffered a monetary loss as a result of (Defendant)'s use of the money.

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You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

VERDICT

Question No. 1: Did (Defendant) enter into an agreement for the improvement of land?

ANSWER: _____

(Yes/No)

Question No. 2: If you answered "yes" to Question 1, then answer this question:

Did (Defendant) receive money from the owner under an agreement for the improvement of land?

ANSWER: _____

(Yes/No)

Question No. 3: If you answered "yes" to Question 2, then answer this question:

Did (Defendant) intentionally use part or all of the money for a purpose other than the payment of claims due or to become due from (Defendant) for labor or materials used in the improvements before all claims were paid [in full] [proportionally in case of a deficiency]?

ANSWER: _____

(Yes/No)

Question No. 4: If you answered "yes" to Question 3, then answer this question:

Was (Defendant)'s use of the money without the consent of the owner of the land and contrary to the (Defendant)'s authority?

ANSWER: _____

(Yes/No)

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Question No. 5: If you answered "yes" to Question 4, then answer this question:

Did (Plaintiff) suffer a monetary loss as a result of (Defendant)'s use of the money?[5]

ANSWER: _____

(Yes/No)

Question No. 6: If you answered "yes" to Question 5, then answer this question:

What is the amount of the monetary loss suffered by (Plaintiff) as result of (Defendant)'s use of the money?

ANSWER: $_____

[IF THE PLAINTIFF REQUESTS EXEMPLARY DAMAGES UNDER §895.446, ADD THE FOLLOWING QUESTION:

Question No. 7: If you answered "yes" to Question 4, then answer this question:

Did (Defendant) know that the use of the money was without the consent of the owner of the land and contrary to the (Defendant)'s authority?

ANSWER: _____

(Yes/No)][6]

NOTES

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[1] The jury instruction for a criminal violation of Wis. Stat. §779.02(5) is WIS JI-CRIMINAL 1443. Where relevant, this instruction follows and is consistent with WIS JI-CRIMINAL 1443. As discussed more fully in Note 6, there may be cases in which a civil recovery is warranted without the criminal intent necessary to support a criminal conviction.

[2] § 779.02(5) prohibits a contractor's use of moneys paid for purposes other than the payment of claims until the claims have been paid in full "or proportionally in cases of a deficiency." The deficiency situation is discussed in State v. Keyes, 2008 WI 54, 309 Wis.2d 516 (Ct. App. 2008) at ¶ 20-34. Use the language in the second set of brackets in the case of a deficiency.

[3] This definition is based on the definition of "Owner" in Wis. Stat. §779.01(2)(c).

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[4] The criminal jury instruction note on this element points out that "The third element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): 'The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust.' No further intent — to defraud or to permanently deprive — is required."

[5] If the plaintiff is proceeding on other causes of action such as breach of contract, the verdict questions on damages will have to be integrated. Because damages for theft by contractor may be eligible for actual costs and exemplary damages under §895.446, it will be necessary to differentiate such damages from damages based on other claims.

[6] This verdict question addresses the element of criminal intent, which is not necessary to sustain a simple claim for civil damages under §779.02(5), but is necessary to sustain a claim for exemplary damages and litigation costs under §895.446. The Wisconsin Supreme Court decision in Tri-Tech v. Americomp, 254 Wis.2d 418 (2002) contemplates the possibility of a civil claim based on a violation of Wis. Stat. §779.02(5) which would not qualify for treble damages if the violation was not the result of the requisite criminal intent:

> Because Wis. Stat. §943.20 is one of the offenses that qualifies for the treble damages remedy of Wis. Stat. §895.80 [now renumbered to §895.446], we agree with the court of appeals' conclusion that treble damages are available for theft by contractor under Wis. Stat. § 779.02(5), provided, however, that the elements of both the civil *and* the criminal statutes are proven, albeit to the civil preponderance burden of proof. Stated differently, the basis of liability for criminal theft by contractor is a violation of the trust fund provisions of Wis. Stat. §779.02(5), plus the criminal intent required by Wis. Stat. § 943.20(1)(b). 254 Wis.2d at 430.

What exactly is it the plaintiff must prove to demonstrate criminal intent? The court in Tri-Tech explained the requirement as follows:

> Accordingly, to sustain a cause of action for treble damages under Wis. Stat. § 895.446 for theft by contractor under Wis. Stat. § 943.20, the plaintiff must prove, by a preponderance of the credible evidence, the elements of the criminal offense, including that the defendant knowingly retained, concealed, or used contractor trust funds without the owner's consent, contrary to his authority, and with intent to convert such funds to his own use or the use of another. *Id.* at 433.

The Criminal Jury Instructions Committee discusses the required level of intent in its footnote 8 to WIS JI-CRIMINAL 1443:

> In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractors requires only "criminal intent" and not "intent to defraud." Hess seems to indicate the "criminal intent" boils down to knowledge that the defendant is in the position of trustee and that he intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).
>
> The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that

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the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on "personal use." The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is "personal use" and thus the sixth element in the 1976 instruction was redundant.

This note was cited with apparent approval in State v. Sobkowiak, . . .

In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 — a civil case — the court referred to the "six elements" of theft by contractor without referring to this instruction or to State v. Sobkowiak, . . . The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

The Civil Jury Instructions Committee shares the view of the Criminal Jury Instructions Committee that the Supreme Court in Tri-Tech intended to hold that the criminal level of intent described in current JI-1443 is what is required to sustain a civil claim for treble damages. Verdict Question No. 7 mirrors the fifth and final element of WIS JI-CRIMINAL 1443.

COMMENT

This instruction was approved in 2015. See also Wis JI-Criminal 1443.

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2725 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A person may recover damages for the intentional infliction of severe emotional distress upon him or her by another.

A person who by extreme and outrageous conduct intentionally causes emotional distress to another is liable to that person if the resulting emotional distress is severe.

Four factors must be established for an injured person to recover:

1. That the conduct was intended to cause emotional distress,

2. That the conduct was extreme and outrageous,

3. That the conduct was a cause of the person's emotional distress, and

4. That the emotional distress was extreme and disabling.

For a person's conduct to be intentional, you must find that the person acted for the purpose of causing emotional distress to the other person.

For conduct to be extreme or outrageous, you must find that the average member of the community would find the conduct as a complete denial of the individual's dignity as a person. The conduct must be gross and extreme and not merely in the field of carelessness or bad manners.

For a person's conduct to be a cause of a party's emotional distress, you must find that the conduct had a substantial effect in producing the emotional distress.

For a person's emotional response to be extreme and disabling, you must find that the person was unable to function in other relationships because of the emotional distress caused by the conduct. Temporary discomfort is not extreme and disabling and cannot be the basis of recovery.

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COMMENT

This instruction and comment were approved by the Committee in 1980. The instruction was revised in 1991 and 2002. The comment was updated in 1997, 2001, 2004, 2005, 2014, and 2020. The 2020 revision updated case law citations.

Alsteen v. Gehl, 21 Wis.2d 349, 124 N.W.2d 312 (1963); Wright v. Hasley, 86 Wis.2d 572, 273 N.W.2d 319 (1979); Przybyla v. Przybyla, 87 Wis.2d 441, 444, 275 N.W.2d 112 (1978); Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978).

Burden of Proof. Wis JI-Civil 205, Burden of Proof, Middle Burden, is appropriate and should be used.

For negligent infliction of emotional distress, see Wis JI-Civil 1510 and 1511.

In a 2001 decision, the plaintiff argued that she was entitled to damages for intentional infliction of emotional distress because a police officer acted intentionally when he shot her dog. Rabideau v. City of Racine, 2001 WI 57, 243 Wis.2d 486, 627 N.W.2d 795. The court rejected the plaintiff's argument, concluding that to prevail on a claim for intentional infliction of emotional distress:

> There must be something more than a showing that the defendant intentionally engaged in the conduct that gave rise to emotional distress in the plaintiff; the plaintiff must show that the conduct was engaged in for the purpose of causing emotional distress.

Matter of Public Concern. A claim for intentional infliction based on disclosure of information is precluded by the First Amendment if the disclosure discussed a "matter of public concern." Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

Media Defendant. A plaintiff does not have a claim against a media defendant for intentional infliction of emotional distress if the contents of the broadcast were not false. Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.

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2750 EMPLOYMENT RELATIONS: WRONGFUL DISCHARGE — PUBLIC POLICY

In Wisconsin, an employer may discharge an employee for good reason, for no reason, or even for a reason that is morally wrong, without committing a legal wrong. An exception to this rule is [where the termination of the employee's job violates] [where the employee is discharged for refusing an employer's command to do something that would itself violate] a well-established and important public policy. Public policy in Wisconsin prohibits the firing of an employee for (insert policy).

(Plaintiff) claims that (he) (she) was fired from (his) (her) job by (defendant) because (give public policy being violated, e.g., (he) (she) refused to commit perjury). If you find that (defendant) fired (plaintiff) for that reason, then (plaintiff) was wrongfully discharged.

A discharge is not wrongful merely because it is retaliatory, unreasonable, or motivated by bad faith or malice. Further, a discharge is not wrongful merely because the discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it.

SPECIAL VERDICT

Was (plaintiff) wrongfully discharged from (his) (her) employment by (defendant)?

ANSWER: _____

Yes or No

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COMMENT

This instruction was approved in 1985 and revised in 1991 and 1995. The comment was updated in 1986, 1987, 1995, 1998, 2018, and 2020.

Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983); Ferraro v. Koelsch, 124 Wis.2d 154, 368 N.W.2d 666 (1985); Scarpace v. Sears, Roebuck & Co., 113 Wis.2d 608, 335 N.W.2d 844 (1983); Yanta v. Montgomery Ward & Co., Inc., 66 Wis.2d 53, 244 N.W.2d 389 (1974). See also Schultz v. Industrial Coils, Inc., 125 Wis.2d 520, 373 N.W.2d 74 (Ct. App. 1985). A claim for wrongful discharge based on public policy may be grounded upon an administrative rule. Winkelman v. Beloit Memorial Hosp., 168 Wis.2d 12, 483 N.W.2d 211 (1992).

Employment-at-Will Doctrine. In Brockmeyer, the court expressly refused to require good faith in the termination of employment contracts. However, the court did recognize the "public policy exception" to the employment-at-will doctrine. The court stated that the public policy claimed by the plaintiff must be evidenced by a constitutional or statutory provision. The other two exceptions to employment-at-will are: (1) where an employment contract specifies a period of employment and (2) where a statutory provision governs the employment agreement. The various Wisconsin statutory provisions prohibiting the discharge of an employee for certain reasons are listed by the court in Brockmeyer v. Dun & Bradstreet, 113 Wis.2d at 567 and 568 n.9.

In Wandry v. Bull's Eye Credit Union, 129 Wis.2d 37, 384 N.W.2d 325 (1986), the court concluded that Wis. Stat. § 103.455 articulates a "fundamental and well-defined public policy" within the public policy exception to the employment-at-will doctrine. This statute proscribes economic coercion by an employer upon an employee to bear the burden of a work-related loss when the employee has no opportunity to show that the loss was not caused by the employee's carelessness, negligence, or willful misconduct. Wandry, supra at 47.

In Hausman v. St. Croix Care Center, 214 Wis.2d 654, 571 N.W.2d 393 (1997), the supreme court examined the employment-at-will doctrine, surveyed the breadth of the narrow public policy exception to the doctrine, and determined whether the case fell within its requirements. In its decision, the court rejected the plaintiffs' claims that the facts as alleged fit within the existing public policy exception and declined to adopt a broad whistle-blower exception. However, the court recognized that the plaintiffs' compliance with an affirmative legal duty requiring them to take action to prevent abuse or neglect of nursing home residents comports with a well-defined public policy and the rationale of the court's public policy exception to the employment-at-will doctrine.

The plaintiff-employee bears the burden of proving that the dismissal violates a clear mandate of public policy. Kempfer v. Automated Finishing, Inc., 211 Wis.2d 100, 564 N.W.2d 692 (1997). In Kempfer, the court said that if a public policy is not contained in a statutory, constitutional, or administrative provision, it cannot fall under the public policy exception to the employment-at-will doctrine. However, just because a public policy is evidenced by a statutory, constitutional, or administrative provision does not mean that it falls under the exception. 211 Wis.2d at 112. The public policy must still be found to be fundamental and well defined. In Kempfer, the court noted that an administrative rule is less likely to satisfy the fundamental and well defined requirements than a statutory provision and that a statutory provision is less likely to rise to the level of fundamental and well defined than a constitutional provision. In Kempfer, the supreme court made clear that the Wisconsin public policy exception to the employment-at-will doctrine is very narrow. It only provides that an employee

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may not be discharged for refusing a command to violate a fundamental and well-defined public policy that is evidenced by a constitutional, statutory, or administrative provision. With the exception of such a public policy, an employer may discharge an employee at will for any reason or for no reason.

Procedure. In Brockmeyer, the court explained the format for wrongful discharge litigation. The threshold determination of whether the public policy asserted by the plaintiff is a well-defined and fundamental one is an issue of law and is to be made by the trial court. Brockmeyer v. Dun & Bradstreet, supra at 574. At trial, the plaintiff must then "demonstrate" to the jury that "the conduct that caused the discharge was consistent with a clear and compelling public policy." The decision in Brockmeyer, supra at 574, suggests by way of dicta that an employer must then produce evidence to prove that the dismissal was for "just cause." See also Winkelman, supra at 24. The Committee is of the opinion that "just cause" need not be proved but only that the discharge was for a reason other than a violation of a clear and compelling public policy.

Remedies. In Brockmeyer v. Dun & Bradstreet, supra, the court determined that a wrongful discharge claim is a contract action. It specifically rejected tort remedies including punitive damages. Instead, it stated, at 113 Wis.2d at 575:

> We believe that reinstatement and backpay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee "whole."

The court, in Brockmeyer, also held that where the legislature has created a statutory remedy for a wrongful discharge, that remedy is exclusive. 113 Wis.2d at 576 n.17.

Effect of Employee Handbooks. Representations in an employee's handbook may limit the power of an employer to terminate an employment relationship which would otherwise be terminable at will. Ferraro v. Koelsch, supra. A handbook may convert the employment relationship into one that can only be terminated by adherence to contractual terms.

Attorney's Fee. Attorney's fees are not available in a common law wrongful discharge cause of action. Winkelman v. Beloit Memorial Hosp., supra.

Intentional disability discrimination. An employer engages in employment discrimination if it terminates a person from employment "because of any basis enumerated in s. 111.321." Wis. Stat. § 111.322(1). Two methods of determining whether an employer intentionally terminated employment "because of" disability are available. The first method asks whether the employer held "actual discriminatory animus against an employee because that employee was an individual with a disability[.]" Maeder v. Univ. of Wisconsin-Madison, ERD Case No. CR200501824 (LIRC June 28, 2013). The alternative method, known as the "inference method," finds intent to discriminate when an employer bases its adverse action on "a problem with that employee's behavior or performance which is caused by the employee's disability." See Id. A violation of Wis. Stat. § 111.322(1) cannot be found to have occurred under the inference method of proving intentional discrimination unless the employee proves the employer knew that a disability caused the conduct on which adverse employment decision was made, and that the employer had this knowledge at the time it made the decision. Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n, 2018 WI 76, 382 Wis.2d 624, 657, 914 N.W.2d 1 (2018).

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Probationary Employees: For decisions discussing the applicability of procedural guarantees outlined in sec. 62.13(5) as they pertain to probationary employees, see Kaiser v. Board of Police & Fire Commissioners of Wauwatosa, 104 Wis.2d 498, 311 N.W.2d 646 (1981); and State v. City of Prescott, 390 Wis.2d 378, 938 N.W.2d 602, 2020 WI App 3.

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2760 BAD FAITH BY INSURANCE COMPANY (EXCESS VERDICT CASE)

A policy of insurance is a contract between the insurance company and the person who buys the policy, who is known as the "insured." Under the terms of a policy, the insurance company reserves the right to exclusively control the defense of a claim filed by an injured party against the insured and the company. If the claim or demand is less than the limits of the policy, normally the insured is excluded from interfering in any way in the investigation and the negotiations for settlement of the claim and has no voice in the legal procedures to be followed by the insurance company in defending the claim filed against him or her and the insurance company.

Thus, so long as the ultimate settlement or recovery by the injured party does not exceed the monetary limits of the insured's policy, the question of whether the claim should be settled or the manner in which it is defended usually is of no concern to the insured.

When, however, an injury does occur and a claim or demand is made, which should alert the insurance company that the injured party's recovery might exceed the insured's policy limits, then the interest of the policyholder must become a matter of concern to the insurance company.

At this point, certain duties on the part of an insurance company do arise. Stated generally, it is a duty to exercise ordinary care in the handling of the injured party's claim to the end that the insured's interest will be protected. This duty arises because the insured, by virtue of the policy with the insurance company, has agreed to let the company investigate and defend the claim, has given the insurance company the exclusive right to settle or

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compromise the claim, has given the company complete control in the defense of the claim, and further has agreed not to participate except at his or her own expense by hiring his or her own lawyer to represent him or her on any financial risk above the limits in the policy.

Because of this relationship, an insurance company has the following duties to its insured in handling an injured party's claim filed against it and the insured:

1. To conduct an investigation of the facts and circumstances of the accident by all available and reasonable means, as well as to inform itself of the nature and extent of the injuries sustained by an injured party and the extent to which the injured party has recovered from those injuries. [This duty includes gathering information about who was at fault in causing the accident, which would include interviewing witnesses to the accident or taking or attending depositions of those persons who had personal knowledge of the facts necessary to make an overall evaluation of the case.]

On the basis of all information learned from its investigation, the company then must make a reasonable appraisal of the injured party's chances of winning if the lawsuit should go to trial and the amount of damages the injured party will probably recover against it and the insured if the case were tried.

2. The further duty to advise its insured if it is satisfied from the investigation and evaluation of all the facts that it appears probable that the injured party will recover an amount in excess of the policy limits so that the insured can take appropriate and timely action for his or her own protection. (This could involve the insured's desire to retain his or her own lawyer to represent him or her on any probable monetary claim above the policy limits.)

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3. To timely and adequately advise the insured of any and all meaningful negotiations for settlement between the company and the injured party, particularly of any offers and counter-offers of settlement.

The proper fulfillment of these obligations which I have just given to you imposes upon an insurance company a duty to act fairly and reasonably toward its insured at all stages of its investigation and in the handling of the defense of the injured party's claim. To put it another way, the insurance company must use reasonable diligence, which means such care and diligence as the ordinarily prudent insurance company would use under like or similar circumstances in investigating, evaluating, defending, and negotiating on behalf of its insured. While there is no requirement that an insurance company must absolutely exhaust all sources of information, it is required to exercise reasonable care and diligence to that end.

In answering question 1, the burden of proof is on (plaintiff) to satisfy you, by the greater weight of the credible evidence, to a reasonable certainty, that the question should be answered "yes."

Question 2 reads as follows: "If you have answered question 1 'yes,' then answer this question. Did the failure of the insurance company to perform its duties to its (plaintiff), as found in question 1, demonstrate such a significant disregard of (plaintiff)'s interests that the insurance company's final decision not (to pay policy limits) to settle the case was made in bad faith?"

In answering question 2, you are now called upon to determine whether the company's refusal to settle the case (for policy limits), and thereby expose its insured to a judgment over the policy limits, was made in bad faith.

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"Bad faith" is a term of broad application, and it is sometimes difficult to exactly define within the framework of every case. The term "bad faith" carries with it a suggestion of dishonest or deceitful conduct. In deciding whether the insurance company acted in bad faith in this case, you should carefully consider whether the company, in failing to perform the duties it owed to (plaintiff), demonstrated a significant disregard of (plaintiff)'s rights and economic interests.

In deciding not (to pay (plaintiff)'s policy limits) to settle the case, you are advised that an insurance company, because it has the right to exercise its own judgment whether the claim should be contested or settled, has an obligation to its insured to make an informed and reasonable judgment.

Its conduct should be accompanied by considerations of good faith. Its decision not to settle (by paying an insured's policy limits) should be an honest one, taking into consideration both the interest of the company and the interest of the insured. It should be the result of weighing of probabilities in a fair and honest way.

Even though you may have concluded that the insurance company acted negligently in the performance of its duties in your answer to question 1, that alone is not enough to show that the company acted in bad faith. Rather, you should consider the totality of the company's conduct in the handling of the injured party's claim to determine whether the company's decision to expose its insured to a judgment over the policy limits was an intellectually honest and reasonable decision. If you determine that it was not an honest and reasonable decision, then the company may be said to have acted in bad faith. On the other hand, if you conclude from all the evidence that the insurance company's decision not to

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settle the case was reasonable under the circumstances and made in the honest belief that the injured party's claim could be defeated or that the damages could be kept within the insured's policy limits, then you should find that the insurance company did not act in bad faith in refusing to settle the case.

The burden of proof to satisfy you that question 2 should be answered "yes" is on (plaintiff). This means that (plaintiff) must satisfy you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (defendant insurance company) acted in bad faith toward (plaintiff) in the performance of its duties.

SPECIAL VERDICT

Question 1: Did (insurance company) acting through its lawyers breach any of the duties that it owed to its insured, (insured), in the handling of (injured party)'s claim against (insured) and the insurance company?

Answer:_____
Yes or No

Question 2: If you have answered question 1 "yes," then answer this question. Did the failure of (insurance company) to perform its duties to (insured), as found in question 1, demonstrate such a significant disregard of (injured)'s interests that the insurance company's final decision not to [pay policy limits to] settle the case was made in bad faith?

Answer:_____
Yes or No

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COMMENT

This instruction was formerly Wis JI-Civil 3120. It was revised and renumbered in 1980 and revised in 1984 and 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was revised in 1986, 1991, 1996, and 1998.

Under Wisconsin case law, an insurance company, owing to its fiduciary relationship with an insured, has certain well-defined duties to perform in the handling of a claim against its insured. These duties are as follows:

1. The duty to make a diligent effort to ascertain all of the facts of the accident upon which an informed and reasonable evaluation can be made of the claim against its insured;

2. The duty to advise its insured that the recovery could exceed policy limits so that the insured might take timely and independent action to protect his or her own interest; and

3. The duty to keep the insured timely and adequately informed of any offers of settlement made to the insurance company or its attorney and the progress of the settlement negotiations. (See Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 231 N.W. 257 (1931), and Baker v. Northwestern Nat'l Casualty, 22 Wis.2d 77, 125 N.W.2d 370 (1963), and 26 Wis.2d 306,132 N.W.2d 493 (1965).) See also Kranzush v. Badger State Mut. Casualty Co., 103 Wis.2d 56, 307 N.W.2d 256 (1982).

These duties arise because the policy between the insurer and the insured gives the insurer complete control over the investigation, settlement negotiations, and, most importantly, the final decision whether to settle the case within policy limits. Mowry v. Badger State Mut. Casualty, 129 Wis.2d 496,510, 385 N.W.2d 171 (1986). If the case is settled within policy limits, there is no exposure to the insured and his or her rights under the policy are not violated.

Some members of the bench and bar believe that the ultimate question of bad faith rests solely upon negligence considerations and that there is no requirement to show any dishonest or deceitful conduct by an insurance company or its lawyers toward the insured. This view seems to be supported by dicta in Alt v. American Family Mut. Ins. Co., 71 Wis.2d 340, 354, 237 N.W.2d 706 (1976), in which the court states:

> While the Hilker case makes it clear that the liability of the insurance company in a situation such as this is for negligence, i.e., the breach of ordinary care in a fiduciary relationship, the burden of proof is higher than that required in most negligence cases. The claimant must assume the middle burden of proof, and the breach of the insurer's duty must be proved by clear and convincing evidence. The insurance company, however, to be liable, need not be found to have committed fraud or to have acted dishonestly in respect to its insured.

A close reading of Wisconsin decisions involving bad faith by an insurer shows that Wisconsin is committed to what Professor Keeton calls the "dual standard" in deciding excess verdict bad faith cases. The conduct of the insurance company in dealing with its insured (i.e., the manner in which it performs its duties

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to the insured) is conceptually a negligence question; its ultimate decision not to settle within policy limits is then properly one of good or bad faith. See Keeton, "Liability Insurance and Responsibility for Settlement," 67 Harv. L. Rev., 1136 (1954), and "Insurer's Excess Liability: Evaluating Conduct and Decision in Refusal of Settlement Offers," Rebecca Leair, FIC Quarterly/Summer 1983, pp. 371-396.

The Committee believes that the passage from Alt quoted above can only be reconciled with other Wisconsin cases by reading it to mean not that liability but rather that the performance of an insurance company's duties to its insured are tested by negligence law. The proper inquiry then is whether the insurance company, by act or omission, performed its duties as a reasonable insurance company would in the conduct of its own business.

If the trier of fact determines that the company has not acted as a reasonable insurer, then there has been a breach of fiduciary duty. However, the ultimate question of whether the company's refusal to settle the case within policy limits was made in bad faith can be answered only after giving overall consideration to the nature and extent of the company's acts of negligence. As stated in Baker v. Northwestern Nat'l Casualty Co., 26 Wis.2d 306, 315, 132 N.W.2d 493 (1965):

> The extent and character of the negligence, however, are factors to be considered by the trier of fact in weighing the matter of bad faith. To hold the carrier liable for the excess judgment, the insured must show by clear, satisfactory, and convincing evidence, that the carrier acted in bad faith.

If the trier of fact determines that the company's conduct was of a character to evince a significant disregard of its insured's rights, then it can be said to have acted in bad faith. The reason that this must be established by clear and satisfactory evidence is because the concept of bad faith under Wisconsin law is, and always has been, a species of fraud and carries with it the suggestion of the company's not having dealt fairly and honestly with its insured.

Based on its review of the case law, the Committee revised this instruction to more clearly present to the jury the two-step fact-finding process. If the jury concludes that the insurer has breached its duties to an insured to the extent that the breach evinces a significant disregard of the insurer's rights, then, under Wisconsin law, its conscious decision not to pay the insured's policy limits is deceitful and bad faith conduct. This process was approved in Warren v. American Family Mut. Ins. Co., 122 Wis.2d 381, 361 N.W.2d 724 (Ct. App. 1984).

The suggested special verdict has also been revised so that two questions, rather than one, are presented. The first question deals with the conduct of the insurer; the second question deals with the insurer's decision. The Committee believes this two-question verdict most clearly presents the "dual standard" and avoids begging the question by including the term "bad faith" in the same question which asks whether the insurance company breached any of its duties. For this reason, two separate questions are necessary.

It is not bad faith for an insurer to refuse an offer of settlement within policy limits when the question of policy coverage is fairly debatable. See Mowry v. Badger State Mut. Casualty, supra.

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Expert Witness Testimony. For the requirement of expert testimony in bad faith actions, see Weiss v. United Fire & Casualty Co., 197 Wis.2d 365, 541 N.W.2d 753 (1996). In that decision, the supreme court rejected a bright-line rule requiring expert testimony in all bad faith tort claims.

The court of appeals has held that insurers are responsible for the negligence of its attorneys in conducting the actual litigation of a case. Majorowicz v. Allied Mut. Ins. Co., 212 Wis.2d 513, 569 N.W.2d 472 (Ct. App. 1997). In this case, the insurer argued that only if an employer has the right to control an employee's performance may it be held vicariously liable, under traditional agency principles for that individual's conduct. Therefore, the insurer said the trial court had erred in holding it responsible for the negligence of its counsel in conducting the actual litigation in the case. It argued that an insurer has no right to control the independent professional judgment of the counsel it hires to defend its insured. Moreover, it asserted, because an insurer cannot practice law itself, its contractual duty to defend must be delegable. The court of appeals concluded, however, that an insurance company's contractual relationship with its insured to exercise good faith is not delegable. It said the nondelegable duty exception is based upon the theory that certain responsibilities of a principle are so important that the principle should not be permitted to bargain away the risks of performance. Majorowicz v. Allied Mut. Ins. Co., supra at 526. In Majorowicz, the trial judge modified the patterned bad faith jury instruction. It added the following language to Wis JI-Civil 2760:

> [an insurance company has more than a passive role, that in some circumstances at least, it has an affirmative duty to seize whatever reasonable opportunity may present itself to protect its insured from excess liability.]

The court of appeals in Majorowicz determined that the language that was added to the jury instruction was taken verbatim from Alt v. American Family Mut. Ins. Co., supra. The court of appeals held that this passage accurately summarized Wisconsin bad faith law and concluded that there was no err in the modified jury instruction.

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2761 BAD FAITH BY INSURANCE COMPANY: ASSURED'S CLAIM

To prove bad faith against (insurance company), the (plaintiff) must establish that there was no reasonable basis for the insurance company's denying (plaintiff)'s claim for benefits under (his) (her) policy and that (insurance company), in denying the claim, either knew or recklessly failed to ascertain that the claim should have been paid.

Bad faith on the part of an insurance company towards its insured is the absence of honest, intelligent action or consideration of its insured's claim.

Bad faith exists if, upon an examination of the facts found by you, you are able to conclude that (defendant) had no reasonable basis for denying (plaintiff)'s claim.

In answering this question, you may consider whether (plaintiff)'s claim was properly investigated and whether the results of the investigation were given a reasonable evaluation and review. If you find that (insurance company) either refused to consider the (plaintiff)'s claim for damages, made no investigation, or conducted its investigation in such a way as to prevent it from learning the true facts upon which the (plaintiff)'s claim is based, the insurance company can be found to have exercised bad faith. This is because you may infer from these facts a reckless disregard on the insurance company's part to learn that there was no reasonable basis for it to deny (plaintiff)'s claim.

If, on the other hand, you find that the insurance company, after conducting a thorough investigation of the facts and circumstances giving rise to the (plaintiff)'s claim, reasonably concluded that the claim is debatable or questionable, then there is no bad faith even though it refused to pay the claim.

(Burden of Proof: Middle Burden, Wis JI-Civil 205)

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SPECIAL VERDICT

Did (defendant) exercise bad faith in denying the claim of (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction was approved in 1979 and revised in 1991. The comment was updated in 1997, 1998, and 2011.

Bad faith conduct by an insurer towards its insured is a tort separate and apart from any breach of contract. Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978); Davis v. Allstate Ins. Co., 101 Wis.2d 1, 303 N.W.2d 596 (1981); Kranzush v. Badger State Mut. Casualty Co., 103 Wis.2d 56, 306 N.W.2d 256 (1982); Benke v. Mukwonago Mut. Ins. Co., 110 Wis.2d 356, 329 N.W.2d 243 (Ct. App. 1982); Brethorst v. Allstate, 2011 WI 41, 334 Wis.2d 23, 798 N.W.2d 467, at ¶ 24.

An insurance company is liable in bad faith only when it has denied a claim without a reasonable basis. The test of the company's conduct in such claims is whether a reasonable insurer under the particular facts and circumstances would have denied or delayed payment of the claim. Poling v. Wisconsin Physicians Serv., 120 Wis.2d 603, 608, 357 N.W.2d 293 (Ct. App. 1984), citing Anderson v. Continental Ins. Co., supra.

The supreme court has said that it is well settled that if an insurer fails to deal in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for bad faith. DeChant v. Monarch Life Ins. Co., 200 Wis.2d 559, 547 N.W.2d 592 (1996). By virtue of the relationship between the parties created by an insurance contract, a special duty arises, the breach of which is a tort and is unrelated to contract damages. The tort of bad faith "is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by the contract. DeChant, at 569. When such a breach occurs, the insurer is liable for any damages which are the result of that breach.

The tort of bad faith was created to protect the insured. Its primary purpose is to redress all economic harm proximately caused by an insurer's bad faith. DeChant, at 570, citing Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973).

In Dechant, the court said that it is the fiduciary relationship between the insured and the insurer that is the key element justifying the use of tort remedies for the insurer's breach of the contractual obligation.

When an insurer acts in bad faith by denying benefits, it is liable to the insured in tort for any damages which are the proximate result of that tort. DeChant, supra. In DeChant, the court concluded that attorney's fees and bond premiums are recoverable by a prevailing party in a first party bad faith action as part of those compensatory damages resulting from the insurer's bad faith.

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Elements. In Brethorst v. Allstate, supra, ¶ 65, the court concluded that "some breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured.

The Brethorst court noted that traditionally, to prove a first-party bad faith claim, the insured has been required to establish two elements. The first element, an objective measure, is that there is no reasonable basis for the insurer to deny the insured's claim for benefits under the policy. The second element is subjective and requires that the insurer knew of or recklessly disregarded the lack of a reasonable basis to deny the claim.

The court in Brethorst noted that the case was "the first to come before this court in which the insured has initiated a bad faith claim without filing any accompanying claim for breach of contract." 2011 WI 41, at ¶ 51.

In Brethorst v. Allstate, the plaintiff filed a first-party bad faith claim without also filing a breach of contract claim. The case involved an uninsured motorist contract. The trial court denied a motion for bifurcation and a stay after concluding that Wisconsin law allowed a party to bring a bad faith claim separately from any underlying breach of contract claim. The Wisconsin Supreme Court affirmed the trial court, but required the plaintiff to establish a wrongful denial of some contracted for benefit as a prerequisite where the suit was for a bad faith claim only. According to the majority, breach of contact is a required showing both as to discovery and proof of a claim of first-party bad faith.

The court in Brethorst v. Allstate, supra, quoted this instruction (JI-Civil 2761) in full. After reviewing Brethorst, the Committee concluded that this instruction is a proper statement of the elements of bad faith. In cases, where the plaintiff proceeds only on bad faith, a showing of breach of contract is required.

Expert Testimony. In DeChant v. Monarch Life Ins. Co., supra, at 567, the court of appeals certified the following issue: "Is expert testimony required as a predicate to instructing the jury in a bad faith action in conformity with Wis JI-Civil 2761, as to the conduct of a reasonable insurer?" The supreme court concluded that the circuit court had correctly determined that expert testimony was not required in the case. The court said that to establish a claim for bad faith, the insured "must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." Citing Anderson v. Continental Ins. Co, supra. The insured must establish that, under the facts and circumstances, a reasonable insurer could not have denied or delayed payment of the claim. In other words, the trier measures the insurer's conduct against what a reasonable insurer would have done under the particular facts and circumstances. In Weiss v. United Fire and Casualty Co., 197 Wis.2d 365, 541 N.W.2d 753 (1995). The supreme court addressed the question of whether an insured can prevail on a bad faith tort claim against an insurer without first introducing expert testimony. In Weiss, the court rejected a categorical rule requiring expert testimony in all bad faith tort claims. Instead, the court held that:

> Cases presenting particular complex facts and circumstances outside the common knowledge and ordinary experience of an average juror will ordinarily require an insured to introduce expert testimony to establish a prima facie case for bad faith. Under the facts and circumstances of other cases, however, the question of whether an insurer has breached its duty as a reasonable insurer to evaluate its insured's claim fairly and neutrally will remain

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well within the realm of the ordinary experience of an average juror and therefore will not require expert testimony.

The supreme court concluded that the circuit court correctly determined that the insured was not required to introduce expert testimony to establish a cause of action against the insurer for bad faith denial of his claim because the jury in the case did not need special knowledge or skill or experience to properly understand and analyze the insurer's conduct.

Damages. A concurring opinion in DeChant noted that attorney's fees incurred in proving a bad faith claim are not awarded as attorney's fees, but rather as an item of damages caused by an insurer's bad faith refusal to pay benefits owed. But the very theory supporting an award of attorney's fees as damages resulting from an insurer's bad faith precludes an award of attorney's fees incurred in proving punitive damages.

Punitive Damages. For the award of punitive damages in bad faith cases, see Anderson v. Continental Ins. Co., supra at 697; McEvoy v. Group Health Cooperative, supra, at 526.

Claims Against Health Maintenance Organizations (HMOs). The Wisconsin Supreme Court has held that bad faith claims may properly be maintained against HMOs. McEvoy v. Group Health Cooperative, 213 Wis.2d 507, 570 N.W.2d 397 (1997). It said to prevail, a plaintiff must plead facts sufficient to show, upon objective review: (1) the absence of a reasonably basis for the HMO to deny the plaintiff's claim for out-of-network coverage or care under his or her subscriber contract; and (2) that the HMO, in denying such a claim, either knew or recklessly failed to ascertain that the coverage or care should have been provided. A plaintiff must make this showing by evidence that is clear, satisfactory, and convincing.

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2762 BAD FAITH BY INSURANCE COMPANY: THIRD PARTY EMPLOYEE CLAIM AGAINST WORKER'S COMPENSATION CARRIER

Instruction withdrawn.

COMMENT

An instruction on this subject was approved by the Committee in 1979. The instruction was withdrawn by the Committee in 1996. This comment was revised in 2005 and 2009. Section 102.18(1)(bp) of the Wisconsin Statutes authorizes the Department of Workforce Development to assess a penalty for bad faith against a workers compensation insurer. This statutory provision states that the penalty is the exclusive remedy against an employer or insurance carrier for malice or bad faith. In Jadofski v. Town Kemper Ins. Co., 120 Wis. 2d 494, 335 N.W.2d 550 (Ct. App. 1984), the court held that this statute is the exclusive remedy for acts occurring after November 28, 1981.

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2769 WISCONSIN FAIR DEALERSHIP LAW: EXISTENCE OF DEALERSHIP

Question _____ of the special verdict asks whether a dealership [was established] [existed] between (_____) and (_____).

To find that a dealership existed between (_____) and (_____) you must determine that two elements were present:

- A contract or agreement existed in which (dealer) was given the right by (grantor) to [sell or distribute (a product) (a service)] [or] [use a trade name, trademark, service mark, logotype, advertising or other commercial symbol]. The contract or agreement may be written or oral; and
- A community of interest existed between (grantor) and (dealer). This means the parties shared a continuing financial interest in which the parties cooperated and coordinated their activities in operating the dealership business or marketing the dealership's (goods) (or) (services) and share common goals in their business relationship.

In determining if a community of interest existed between (dealer) and (grantor), among the things you should consider are:

- How long the parties dealt with each other;
- The extent and nature of the obligations imposed on the parties in any contract or agreement between them;

The percentage of time or revenue the (dealer) devoted to (grantor)'s products or services;

- The percentage of the gross proceeds or profits (dealer) derived from (grantor)'s products or services;

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- The extent and nature of (grantor)'s grant of territory to (dealer);
- The extent and nature of (dealer)'s uses of (grantor)'s proprietary marks (such as trademarks or logos);
- The extent and nature of (dealer)'s financial investment in inventory, facilities, and good will of the alleged dealership;
- The personnel which (dealer) devotes to the alleged dealership;
- How much (dealer) spent on advertising or promotional expenditures for the (grantor)'s products or services;
- The extent and nature of any supplementary services provided by (dealer) to consumers of (grantor)'s products or services.

SPECIAL VERDICT

See Wis JI-Civil 2772.

COMMENT

This instruction was approved in 2002. The comment was updated in 2004, 2009, 2010, and 2020.

Wis. Stat. § 135.02(2); Ziegler Co., Inc. v. Rexnord, Inc., 139 Wis.2d 593, 407 N.W.2d 873 (1987); Baldewein Co. v. Tri-Clover, Inc., 233 Wis.2d 57, 606 N.W.2d 145 (2000); Central Corp. v. Research Products Corp., 2004 WI 76, 272 Wis.2d 561, 681 N.W.2d 178; Moe v. Benelli U.S.A. Corp., 2007 WI App 254, 306 Wis.2d 812, 743 N.W.2d 691, fn. 5.

In Baldewein Co. v. Tri-Clover, the court said the definition of "dealership" in Wis. Stat. § 135.02(2) is both "extremely broad and highly nuanced." The court also remarked that "community of interest" has been the most vexing phrase in the "dealership definition for courts faced with applying the law."

Determining Whether a Community of Interest Exists; Factors. The list of factors in paragraph 3 can be modified based on the evidence. This list is taken from Ziegler, supra. In Central Corp., supra, the Wisconsin Supreme Court said that while the list of factors set forth in Ziegler does not recite every factor that may be considered, it does provide questions that are useful in determining whether a community of interest exists. In Central Corp. v. Research Products Corp., supra, the court said several facts of the parties' business relationship led to the conclusion that summary judgment should not

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have been granted. The supreme court listed the following factors and the alternative inferences that may be drawn from them in determining whether a dealership relationship existed:

1. the parties' 20-year business relationship;

2. the significant financial investment by the dealer in the construction of a warehouse based, in part, on the amount of the grantor's product in inventory;

3. the dealer's practice of keeping a substantial amount of the grantor's product in inventory;

4. the grantor's desire to limit the dealer's sales to a specific territory; and

5. the dealer's practice of keeping spare parts for grantor's products, on hand, at cost to its customers.

The supreme court in Ziegler, supra, established a multiple factor test for determining whether a community of interest exists. The community of interest concept serves to limit the application of the Fair Dealership Law and requires a person "seeking the protections of the law to demonstrate a stake in the relationship large enough to make the grantor's power to terminate, cancel or not renew a threat to the economic health of the person (thus giving the grantor inherently superior bargaining power). Ziegler, supra, p. 605; Baldewein, supra.

In Baldewein, the court stated that a dealership is a "symbiotic relationship." It said:

> The dealer benefits by generating income through sales, without having to undertake the expense of manufacturing. The grantor benefits by having the dealer undertake important marketing functions through investment in inventory, receivables and facilities, and by applying its efforts and experience in merchandising and selling the product.
>
> The WFDL protects dealers who have made a substantial investment in the dealership and who are substantially dependent on the grantor's product line. Ziegler, 139 Wis. 2d at 605. The statute's requirement of a "community of interest" between the parties captures this concept and ensures that the WFDL's protections apply only to those business relationships that involve a higher level of financial interdependence than the typical vendor-vendee relationship.

When a dealer sinks substantial resources into its relationship with a particular grantor-time, money, employees, facilities, inventory, advertising, training-or derives substantial revenue from the relationship (as a percentage of its total), or some combination of the two, the grantor's power to terminate, cancel, or not renew the relationship becomes a substantial threat to the economic health of the dealer and a community of interest can be said to exist.

Modifying the Factors. While the trial court has discretion in deciding how to instruct the jury and thus can modify these instructions, the ten factors used to determine whether a community of interest exists as set forth in Ziegler Co., Inc. v. Rexnord, Inc., 139 Wis.2d 593, 407 N.W.2d 873 (1987), remain appropriate instructions. Water Quality Store v. Dynasty Spas, Inc., 2010 WI App 112, ¶¶44-45. The standard for determining a community of interest as set forth in Home Protective Services, Inc. v. ADT

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Security Services, Inc., 438 F.3d 716, 720 (7th Cir. 2006), is not the law in Wisconsin even though it interpreted Wisconsin law. Water Quality Store, at ¶2.

Where no factual dispute exists, including those arising from the existence of reasonable alternative inferences drawn from otherwise undisputed facts, the community of interest question is one of law for the court. Moe v. Benelli U.S.A. Corp., 2007 WI App 254, 306 Wis.2d 812, 743 N.W.2d 691, fn. 5.

Logo/Commercial Symbol: Even if a party lacks the right to sell, it may still qualify as a dealer if the party makes substantial use of a commercial symbol. However, mere permission to utilize a manufacturer's commercial symbol does not create a dealership. A dealer must instead show considerable investment in promoting a trademark or logo such that the dealer has tied its fortunes to the manufacturer. As the Wisconsin Supreme Court stated in Foerster, Inc. v. Atlas Metal Parts Co., 105 Wis.2d 17, 313 N.W.2d 60 (1981), "[T]here must be more than the mere use of a calling card identifying a manufacturer's representative as an agent for a company." See also, PMT Machinery Sales, Inc. v. Yama Seiki USA, Inc., 941 F.3d 325, 331, (7th Cir. 2019) where the Seventh Circuit Court of Appeals held that the plaintiff's use of the defendant's logos on its website did not involve a substantial investment that would in turn create an imbalance of power between the two parties.

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2770 WISCONSIN FAIR DEALERSHIP LAW: GOOD CAUSE FOR TERMINATION, CANCELLATION, NONRENEWAL, FAILURE TO RENEW, OR SUBSTANTIAL CHANGE IN COMPETITIVE CIRCUMSTANCES (WIS. STAT. § 135.03)

The plaintiff claims that (grantor) violated the Wisconsin Fair Dealership Law by (terminating) (cancelling) (failing to renew) (substantially changing the competitive circumstances) of its dealership agreement w/_____ without good cause. Question ____ of the special verdict asks:

Was the dealership agreement between (dealer) and (grantor) (e.g. terminated, cancelled, etc.) by (grantor) for good cause?

To answer this question "yes" you must determine whether (grantor) had good cause to (e.g. terminate) the dealership agreement it had with (dealer). The burden of proof on this question is on (grantor) to satisfy you that it had good cause to (e.g. terminate) the dealership agreement.

To determine if good cause existed, you must consider the efforts of (dealer) in fulfilling the terms of the agreement. [(Grantor) had good cause to (e.g. terminate) its dealership agreement with (dealer) if (dealer) did not substantially comply with an essential and reasonable requirement imposed by (grantor). [A requirement that discriminates against (dealer) and does not apply to other similar dealers either by its terms or in the way it is enforced is not an essential and reasonable requirement.)]

[**Where evidence of bad faith by a dealer is presented**: [(Grantor) had good cause to (insert act) if (dealer) acted in bad faith in carrying out the dealership agreement. Bad faith means an intention to take unfair advantage of (grantor) through fraud, dishonesty, or

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failure to cooperate or to provide accurate information, or by other activities that render the transaction unfair to (grantor).

SPECIAL VERDICT

See Wis JI-Civil 2772.

COMMENT

This instruction was approved in 2002 and revised in 2004.

Wis. Stat. § 135.03. For the definition of "good cause," and the burden of proof, see Wis. Stat. § 135.02(4).

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2771 WISCONSIN FAIR DEALERSHIP LAW: ADEQUATE NOTICE BY GRANTOR (WIS. STAT. § 135.04)

Question ____ asks whether (grantor) failed to give (dealer) adequate notice of the (termination) (cancellation) (failure to renew) (substantial change in competitive circumstances). The Fair Dealership Law requires that a grantor, such as_____, give a dealer, such as ____, written notice of a (termination) (cancellation) (nonrenewal) (substantial change in competitive circumstances). To be an adequate notice, the notice must:

1. be given to the dealer 90 days in advance of the (termination) (cancellation) (failure to renew) (substantial change in the competitive circumstances); (and)

2. state the reasons for the (e.g. termination)(;) (and)

3. state the steps required of the dealer to correct the deficiency to avoid the (e.g. termination), allowing 60 days for correction.

The burden of proof that the notice was not adequate is on (dealer).

SPECIAL VERDICT:

See Wis JI-Civil 2772.

COMMENT

This instruction was approved in 2002 and revised in 2004.

This instruction is used where the dealer challenges the adequacy of the grantor's notice required by Wis. Stat. § 135.04.

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Notice. The notice provisions of Wis. Stat. Ch. 135.04 do not apply if the termination, etc., is grounded in insolvency or an assignment for the benefit of creditors or bankruptcy.

The statutory notice under § 135.04 must be given when the grantor "substantially changes the competitive circumstances of the dealership." Jungbluth v. Hometown, Inc., 201 Wis.2d 320, 548 N.W.2d 519 (1996). In this case, the court rejected that the grantor's argument that the 90-day notice only applies to a substantial change in the competitive circumstances of a dealership agreement.

Where the termination, etc., is based upon nonpayment of sums due under the dealership, Wis. Stat. § 135.04 provides that the grantor must provide the dealer with at least 90-days' prior written notice. The notice must provide that the dealer has 10 days in which to remedy the default. White Hen Pantry v. Buttke, 100 Wis.2d 169, 177, 301 N.W.2d 216 (1981).

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2772 WISCONSIN FAIR DEALERSHIP LAW: SPECIAL VERDICT

Question ____: Did a dealership exist between (_____) and (_____)?

ANSWER: _____
Yes or No

If you answered "yes," to question _____, then answer the following question:

Question ____: Did (grantor) (e.g. terminate, cancel, fail to renew, substantially change the competitive circumstances) of the dealership agreement with (dealer)?

ANSWER: _____
Yes or No

If you answered "yes," to question _____, then answer the following question:

Question ____: Was the dealership agreement between (dealer) and (grantor) (e.g. terminated, cancelled, etc.) by (grantor) for good cause?

ANSWER: _____
Yes or No

If you answered "no," to question _____, then answer the following question(s):

[**Note:** If adequate notice is at issue (see JI-Civil 2771):

Question ____: Did (grantor) fail to provide adequate notice to (dealer) of the (e.g. termination, cancellation, etc.)?

ANSWER: _____
Yes or No]

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[**Note:** If correction of the deficiency is at issue:

Question ____: Was the deficiency corrected within 60 days?

ANSWER: _____

Yes or No]

Question ____: What sum of money will compensate (dealer) for the termination (cancellation, etc.) of the dealership agreement by (grantor)?

ANSWER: $_____

COMMENT

This special verdict was approved in 2002 and revised in 2004.

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2780 INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIP

Question _____ of the Special Verdict asks whether (plaintiff) had a contractual relationship (prospective contractual relationship) with (3rd party).

[If there is an issue on whether the relationship amounts to a contract, use appropriate contract instructions.]

Question ____ of the Special Verdict asks whether (defendant) interfered with the (prospective) contractual relationship (plaintiff) had with (3rd party).

An interference may consist of any conduct or words conveying to (3rd party) the defendant's desire to influence (3rd party) to refrain from dealing with the plaintiff. It could be a simple request or persuasion, exerting only moral pressure, as well as threats or promises of some benefit to (3rd party). It does not require ill will or expression of malice towards the plaintiff.

Question _____ of the Special Verdict asks whether that interference on (defendant)'s part was intentional.

In determining (defendant)'s intent, you may consider (his) (her) actions and statements. Ordinarily, it is reasonable to infer that a person intends the natural and probable consequences of (his) (her) acts.

Although other reasons may appear, (plaintiff) must prove that (defendant)'s prime purpose was to interfere with the contractual relationship (plaintiff) had with (3rd party) or (defendant) knew or should have known that such interference was substantially certain to occur as a result of the conduct.

[If knowledge (plaintiff)'s relationship with (3rd party) is an issue, add the following: It is not necessary that (defendant) had actual knowledge of this specific

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contract. It is sufficient that (defendant) had knowledge of facts which, if followed by inquiry ordinarily made by a reasonable and prudent person, would have led to a disclosure of the contractual relationship between (plaintiff) and (3rd party). This is sometimes referred to as "constructive knowledge."]

Question ____ asks whether a causal connection existed between the interference by (defendant) and the damages claimed by (plaintiff).

Before you can find that (defendant)'s conduct was a cause of the claimed damages, you must find that the defendant's conduct was a substantial factor; that is, it had a substantial influence in producing the damages claimed by the plaintiff. In other words, there must be a real causal connection between defendant's conduct and plaintiff's claimed damages.

Question ____ asks whether (defendant) was justified (or privileged) to interfere with the contractual relationship (plaintiff) had with (3rd party).

In determining whether (defendant)'s conduct was justified, you should weigh all the circumstances of the case. Among the factors you should consider are (1) the nature, type, duration, and timing of the conduct; (2) whether (defendant) had an improper motive; (3) whether (defendant) was motivated by self-interest as opposed to a public interest; (4) the type of interest allegedly interfered with; (5) society's interest in protecting both freedom of action on (defendant)'s part and contractual relationship of parties; (6) the closeness or remoteness of (defendant)'s conduct to the alleged interference; (7) whether (plaintiff) and (defendant) are competitors; and (8) whether (defendant)'s conduct, even though intentional, was fair and reasonable under the circumstances.

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A defendant's conduct may only be found justified if the means employed by the defendant were lawful. A person's conduct cannot be justified if the person acted from ill will or an improper motive towards the plaintiff. Some ill will does not preclude the possibility of justification, so long as defendant acted in substantial part with a proper motive in mind.

[**For privileges, see Comment**.]

The burden of proof as to questions one, two, three, four, and six is on (plaintiff). The burden of proof as to question five is on (defendant). In questions one and five, the party contending that the question should be answered "yes" must satisfy you, by the greater weight of the credible evidence, to a reasonable certainty, that "yes" should be your answer.

Before you may answer "yes" to questions two, three, or four, (plaintiff) must satisfy you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that "yes" should be your answer as to the questions under consideration.

SPECIAL VERDICT

First Question: Did (plaintiff) have a contract with (third party) at the time of (defendant)'s alleged interference?

Answer: _____

Yes or No

[**Note**: In most cases, the first question can be answered by the court as a matter of law.]

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Second Question: If you have answered question 1 "yes," answer this question: Did (defendant) interfere with (plaintiff)'s contract with (third party)?

Answer: _____

Yes or No

Third Question: If you have answered question 2 "yes," answer this question: Was the interference on (defendant)'s part intentional?

Answer: _____

Yes or No

Fourth Question: If you have answered question 3 "yes," answer this question: Was the interference on (defendant)'s part a cause of damages to (plaintiff)?

Answer: _____

Yes or No

Fifth Question: If you have answered question 4 "yes," answer this question: Was the interference on (defendant)'s part justified?

Answer: _____

Yes or No

Sixth Question: Damages.

COMMENT

This instruction and comment were approved by the Committee in 1990. The instruction was revised in 2002 and 2005 as to the burden of proof language. The comment was updated in 1996, 2001, 2005, 2014, and 2020. The 2020 revision updated case law citations.

Wisconsin adopted the 1939 version of the Restatement of Torts, § 766, in Mendelson v. Blatz Brewing Co., 9 Wis.2d 487, 101 N.W.2d 805 (1960). The updated 1979 version of this section of Restatement, Second, Torts was adopted in Charolais Breeding Ranches, Ltd. v. FPC Securities Corp., 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979).

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Also actionable is preventing a party from performing a contract or causing performance to be more expensive or burdensome, § 766A, or interfering with a prospective contractual relationship, § 766B Restatement, Second, Torts; Cudd v. Crownhart, 122 Wis.2d 656, 659, 364 N.W.2d 158 (Ct. App. 1985) rev. den.

Evidentiary Burden. No Wisconsin appellate court has determined whether the plaintiff must show "improper" interference or if the defendant must prove that his or her interference was justified. Nor does the Restatement delineate on whom the burden lies. The Committee concurs with two federal courts' interpretation of Wisconsin law that plaintiff establishes a prima facie case by showing an intentional interference with his or her contract by defendant, and the latter must then prove justification for his or her acts. See Chrysler Corp. v. Lakeshore Commercial Fin. Corp., 389 F. Supp. 1216, 1221 (E.D. Wis. 1975), aff'd., 549 F.2d 804 (1977); and Federal Pants, Inc. v. Stocking, 762 F.2d 561 (7th Cir. 1985).

A plaintiff does not have to show malicious intent to sustain a claim. Foseid v. State Bank of Cross Plains, 197 Wis.2d 772, 541 N.W.2d 203 (Ct. App. 1995).

The plaintiff does not have the burden of proving lack of privilege. Rather, proof by the plaintiff of intentional interference with the existing contractual relations of another is sufficient to establish liability. This shifts the burden of proving justification or privilege for any interference to the defendant. Finch v. Southside Lincoln-Mercury, Inc., 2004 WI App 110, 274 Wis.2d 719, 685 N.W.2d 154 (citing Chrysler Corp. v. Lakeshore Commercial Fin. Corp., supra, and Wis JI-Civil 2780). See also Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wisconsin, S.C., 2005 WI App 217, 287 Wis.2d 560, 706 N.W.2d 667.

Interference. Interference may also be found where the actor knows the interference is certain or substantially certain to occur as a result of his or her action. Foseid, supra at 790 n.11. However, this concept based on Restatement, Second, Torts, applies only where it is apparent at the outset that the tortfeasor acted with the intention to interfere with the prospective contract or acted in such a fashion and for such purpose that he knew that the interference was "certain, or substantially certain, to occur." Foseid, supra at 791 n.11, citing Augustine v. Anti-Defamation League of B'nai B'rith, 75 Wis.2d 207, 221, 249 N.W.2d 547, 554 (1977).

Defenses. Affirmative defenses include truthful information or honest advice within the scope of a request for advice by a defendant to a third party, Restatement, Second, Torts, § 772, and Liebe v. City Fin. Corp., 98 Wis.2d 10, 295 N.W.2d 16 (Ct. App. 1980) rev. den.; Hale v. Stoughton Hosp. Ass'n, Inc., 126 Wis.2d 267, 282, 376 N.W.2d 89 (Ct. App. 1985), and a free speech privilege to assert complaints. Augustine v. Anti-Defamation League B'nai Brith, 75 Wis.2d 207, 218, 249 N.W.2d 547 (1977).

A claim for intentional interference with contract based on disclosure of information is precluded by the First Amendment where the broadcast was a "matter of public concern." Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

Another example would be where defendant has a legally protected interest and believes his or her own interest would be impaired or destroyed by performance of the contract; Restatement, Second, Torts, § 773, and Cudd v. Crownhart, supra at 662.

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If the contract involved is one terminable at will, competition is not an improper basis for interference as long as no wrongful means are employed, no restraint of trade occurs, and the purpose of defendant's actions is to advance his or her own competitive interests; Restatement, Second, Torts, § 768, and Liebe v. City Fin. Co., supra; Pure Milk Prod. Coop. v. National Farmers' Org., 90 Wis.2d 781, 796, 280 N.W.2d 691 (1979).

Other possible avoidances of liability involve situations where defendant has a financial interest in the party induced, where defendant is responsible for the welfare of another, or where the contract is an illegal one or contrary to public policy; Restatement, Second, Torts, §§ 769, 770, and 774.

Damages. Assuming a causal relationship between the defendant's actions and plaintiff's losses, damages may include: (a) pecuniary loss of benefits of the contract, (b) causally related consequential losses, and (c) emotional distress which is reasonably expected to so result from the interference; Restatement, Second, Torts, § 774A.

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2790 TRADE NAME INFRINGEMENT

(Plaintiff) alleges that (defendant) has infringed (plaintiff)'s trade name. Trade names are entitled to protection from infringement to protect the reputation and goodwill of the trade name owner.

A trade name is a word or designation (symbol), or a combination of words or designations, that is used in a manner that identifies a business and distinguishes it from the business or enterprise of others.

To find infringement in this case, you must find first that (plaintiff)'s use of the name "_____" is a trade name; and, second, that the use of the name "_____" by (defendant) creates a likelihood of confusion among the consuming public with (plaintiff)'s trade name, "_____."

A designation is protectable as a trade name only if the designation is distinctive. Designations can be either inherently distinctive or can acquire distinctiveness, through secondary meaning. Inherently distinctive designations are designations that are likely to be perceived by prospective purchasers as symbols that indicate an association with a particular source. Secondary meaning describes the function of identifying goods or services with a particular or single source. A name that is inherently distinctive does not require secondary meaning to be protectable. A name that is not inherently distinctive requires secondary meaning to be protectable. Secondary meaning occurs when the consuming public has come to recognize the trade name as one that identifies the business. The consuming public must recognize the trade name as identifying and distinguishing a (plaintiff)'s goods or services. Secondary meaning can be established

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through: direct evidence, such as consumer testimony or consumer surveys, or through circumstantial evidence, such as evidence of exclusivity, length and manner of the trade name's use, the amount and manner of advertising, amount of sales, market share, and number of customers.

To constitute an infringement, it is not necessary that every word of the trade name be appropriated. It is sufficient that enough be taken to deceive the public. If one word of the trade name is the prominent portion, it may be given greater weight than surrounding words.

(Plaintiff) and (defendant) do not have to be in direct competition for you to find infringement.

[A designation that is understood by prospective customers to denominate the general category of services or business with which it is used is a generic designation. The user of a generic designation, for example, barber shop, lumber company, hospital, or plumber, can never acquire rights in the generic designation as a trade name.]

Once (plaintiff) has established that the designation it seeks to protect is distinctive, either inherently or through secondary meaning, it must prove that (defendant)'s use of a similar designation will cause a likelihood of confusion. In determining whether there is or was a likelihood of confusion between (plaintiff)'s [trade] name and (defendant)'s use of "_____" you may draw on your common experience as citizens of the community.

The factors you may consider in determining likelihood of confusion are:

- the degree of similarity between the names

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- the similarity of the products and overlap of marketing channels
- the area and manner of concurrent use
- the degree of care likely to be used by consumers in selecting the (goods) (services)
- the strength and distinctiveness of (plaintiff)'s name
- evidence of actual confusion, and (defendant)'s intent when selecting the name.

No one factor or consideration is conclusive. Each aspect should be weighed in light of the total evidence presented at the trial. However, while actual confusion or deception is not essential to a finding of trade name infringement, this evidence is entitled to substantial weight.

SPECIAL VERDICT

Question 1: Did (plaintiff) establish that its use of the name "_____" is a trade name?

ANSWER: _____

Yes or No

If you answered "yes" to question 1, then answer the following question.

Question 2: Does (defendant)'s use of the name "_____" infringe (plaintiff)'s trade name?

If you answered "yes" to question 2, then answer the following question.

Question 3: Was (defendant)'s infringement a cause of damages to (plaintiff)?

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ANSWER: _____

Yes or No

If you answered "yes" to question 3, then answer the following question.

Question 4: What sum of money, if any, do you award against (defendant) as damages for the trade name infringement?

$ _____

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2020.

Trade Name. The Wisconsin Supreme Court defined trade name in First Wisconsin National Bank of Milwaukee v. Wichman, 85 Wis.2d 54, 270 N.W.2d 168 (1978), in which the court adopted the rationale of Restatement (Second) of Torts, Tentative Draft No. 8 as the common law in Wisconsin. The court said:

> Restatement (Second) of *Torts*, capsulizes this trend of the courts to bring the definitions of trade names and trademarks in harmony with their function. Tentative Draft No. 8 (1963), sec. 715, defines both trademarks and trade names which have acquired a secondary meaning as trademarks. The term, "trade name," standing alone, refers to a business name. Sec. 716, supra. Sec. 715 defines trademark:
>
> "A trademark is a word, name, symbol, device, letter, numeral, or picture, or any combination of any of them in any form or arrangement, which is used by a person on or in connection with his goods or services in a manner which identifies them as his and distinguishes them from those of others, provided such use is not prohibited by legislative enactment or by an otherwise defined public policy."

"[i]f a trade name has acquired distinctiveness, or secondary meaning, and thus identifies a particular business entity, the user of such trade name is entitled to protection against infringement of that trade name in the same manner and to the same extent as the user of a trademark which has acquired a secondary meaning, that is, to protect the user of the trade name in his business and to protect the public against confusion and deception. The mere fact of the use of a trade name, however, is not sufficient to entitle the user to enjoin all other uses. It is necessary to show that the effect of the use has been to identify the particular business entity and to distinguish it from others and that the actor's use of likely to cause confusion and deception." 85 Wis.2d 54, at p. 62-63; Sec. 717, supra, comment a.

General principles of trademark law. In Ritter v. Farrow, 2019 WI App 46, 388 Wis.2d 421, 933 N.W.2d 167, the Wisconsin Court of Appeals addressed an issue concerning the assignment of

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trademark rights as they pertained to an association of condominium owners. Setting forth certain principles of Wisconsin and federal trademark law, the court noted that, "Although Wisconsin has long recognized a common-law cause of action for trademark infringement, see, e.g., Listman Mill Co. v. William Listman Milling Co., 88 Wis. 334, 60 N.W. 261 (1894), we have also recognized that our case law addressing trademarks is relatively 'undeveloped.' Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd., 2004 WI App 129, ¶34, 275 Wis. 2d 397, 685 N.W.2d 853. Accordingly, we 'look to federal law for guidance' when necessary to resolve a trademark dispute." 2019 WI App 46, footnote 9.

Infringement Claims; Jury Instructions. In D. L. Anderson, 2008 WI 126, 314 Wis.2d 560, 757 N.W.2d 803, the Wisconsin Supreme Court discussed the elements, proof, damages, and jury instructions for trade infringement cases.

The supreme court approved the Wichman analysis of trade name infringement for use in jury instructions, in D. L. Anderson's Lakeside Leisure Co., Inc. v. Anderson:

> "¶42 The trade name infringement jury instructions given by the circuit court were based directly on language in Wisconsin case law.[fn15] In First Wisconsin National Bank of Milwaukee v. Wichman, 85 Wis.2d 54, 270 N.W.2d 168 (1978), this court adopted the approach enunciated in the Restatement (Second) of Torts §§ 715, 716, 717 (Tentative Draft No. 8, 1963). There this court said, "[T]he user of [a] trade name is entitled to protection against infringement of that trade name." Wichman, Page 1985 Wis.2d at 62-63. Spheeris Sporting Goods, Inc. v. Spheeris on Capitol, 157 Wis.2d 298, 459 N.W.2d 581 (Ct. App. 1990), which like this case dealt with a trade name in connection with the purchase of a business appears to be the source of the sections in the jury instructions on trade names that include family names: "Ordinarily, a party has a right to do business under his or her own name. The right may, however, be voluntarily limited by contract. . . . [W]hen a family name is part of a trade name, the family name may be transferred to the purchaser the same as any other asset of the business." Id. at 308 (citations omitted).

Elements. The plaintiff must prove two elements to establish infringement: First, that the plaintiff's trade name has acquired a secondary meaning, and, second, that there is a likelihood of confusion between plaintiff's name and the one the defendant is using.

Anderson approved the trial court's instructions on secondary meaning and likelihood of confusion as follows:

> ¶ 50 Next we proceed to the question of whether the evidence was sufficient to support the jury's verdict. The jury was instructed as follows regarding trade name infringement:
>
> When a trade name has acquired a secondary meaning, the name is entitled to protection from unfair competition based on trade name infringement. . . . If you find that plaintiff's trade name has acquired secondary meaning, you must then determine whether there is a likelihood of confusion between plaintiff's trade name, "D. L. Anderson Co." and defendant's name, "Anderson Marine" . . . . It is not necessary to constitute an

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infringement that every word of the trade name be appropriated. It is sufficient that enough be taken to deceive the public. If one word of the trade name is the salient portion, it may be given greater weight than surrounding words.

¶ 51 The jury instructions thus lay out the two elements a plaintiff must establish to prevail on a trade name infringement Page 23 claim: that the name had secondary meaning and that a second party's use created a likelihood of confusion.

¶ 52 Secondary meaning "describes the function of identifying goods or services with a particular or single source. . . . Key to establishing secondary meaning for a trade name is evidence that the relevant target group mentally identifies the trade name as the single source for the product." Spheeris, 157 Wis.2d at 312 (citations omitted). . .

Damages for Infringement. Anderson approved the use of the tort damage instruction, modified Wis JI-Civil 1700. On this point, the supreme court reversed the court of appeals, and clarified that a damage verdict for trade name infringement does not require precise mathematical evidence:

¶ 62 As we noted, the jury was instructed here that the party claiming damages must "satisfy [the jury] by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages . . . and the amount of the damages." Wis JI-Civil 1700.

¶ 63 In evaluating the sufficiency of the evidence on a damage award in tort, there is thus a two-step analysis: the fact of damages and the amount.

¶ 64 "[T]he fact of damage need only be proved with reasonable, not absolute, certainty. And once the fact of damage is established with reasonable certainty, the amount of damages need only be shown with as much certainty as the nature of the tort and the circumstances of the case permit." 4 Rudolf Callmann, Callmann on Unfair Competition, Trademarks and Monopolies § 23:55 (4th ed. 2003).

Reverse trademark confusion. For a decision discussing the theory of reverse trademark confusion, see Fabick, Inc. v. JFTCO, Inc., 944 F.3d 649, (7th Cir. 2019).

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2791 TRADE NAME INFRINGEMENT: DAMAGES

Question _____ asks: What sum, if any, do you award against (defendant) as damages for the trade name infringement?

In considering the amount to be inserted by you in answer to the damage question, the burden of proof rests upon the person claiming damages to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (plaintiff) sustained damages [with respect to the element or elements mentioned in the question and the amount of the damages.] The greater weight of the credible evidence means that the evidence in favor of an answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. The amount inserted by you should reasonably compensate the person for the damages from the trade name infringement.

[In determining damages, you may consider whether (plaintiff) suffered any measurable loss to its goodwill. The goodwill of a company is an intangible business value that reflects the basic human tendency to do business with merchants who offer products and services of the type and quality the customer desires and expects. Service to the customer, and a willingness to stand behind a warranty and other representations about the quality of the products or services sold by a merchant, are factors that help establish the goodwill of a business. If you find that (plaintiff)'s goodwill has been damaged either by injury to its

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general business reputation or by damage to a particular product or service, you may assess damages as you find to be shown by the evidence.]

The fact that (defendant) did not actually intend, anticipate, or contemplate that these losses would occur is not a relevant factor to be considered by you.

Determining damages for trade name infringement cannot always be made exactly or with mathematical precision; you should award as damages amounts which will fairly compensate (plaintiff) for its injuries.

COMMENT

This instruction and comment were approved in 2009.

See the comment to Wis JI-Civil 2790.

This instruction is based on a verdict in which the jury is asked for damages as a lump sum. As an alternative, the verdict on damages could ask subdivided questions on the specific elements of damages, e.g. loss of business, additional expenses, and loss of goodwill. See D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson, 2008 WI 126, 314 Wis.2d 560, 757 N.W.2d 803.

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2800 CONSPIRACY: DEFINED

A "conspiracy" is a combination of two or more persons acting together to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. The essence of a conspiracy is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish the existence of a conspiracy.

The evidence need not show that the members entered into any express or formal agreement or that they directly, by words spoken or written, stated between themselves what their objectives or purposes were, or the details of them, or the means by which the objectives or purposes were to be accomplished. A conspiracy may be established by evidence that the members in some way or manner, or through some contrivance, positively or without it being openly expressed, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence need not show that all the means or methods claimed by the plaintiff(s) were agreed upon to carry out the alleged conspiracy; nor that all means or methods which were agreed upon were actually used or put into operation. Nor need the evidence show that all persons alleged to have been members of the claimed conspiracy were indeed members.

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COMMENT

This instruction and comment was approved in 1980 and revised in 1984 and 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 1984, 1995, 1998, 1999, and 2018.

Abdella v. Catlin, 79 Wis.2d 270, 275, 255 N.W.2d 516 (1977); Radue v. Dill, 74 Wis.2d 239, 241, 246 N.W.2d 507 (1976); Onderdonk v. Lamb, 79 Wis.2d 241, 246-47, 255 N.W.2d 507 (1977); Dalton v. Meister, 71 Wis.2d 504, 520, 238 N.W.2d 9 (1976); North Highland Inc. v. Jefferson Mach. & Tool Inc., 2017 WI 75, 377 Wis. 2d 496, 898 N.W. 2d 741. See also Scarpace v. Sears, Roebuck & Co., 113 Wis.2d 608, 335 N.W.2d 844 (1983); Maleki v. Fine-Lando Clinic, 162 Wis.2d 73, 469 N.W.2d 629 (1991); Modern Materials v. Advanced Tooling Spec., 206 Wis.2d 435, 557 N.W.2d 835 (Ct. App. 1996); City of Milwaukee v. NL Industries, 2005 WI App 7, 278 Wis.2d 313, 691 N.W.2d 888.

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Eastern States Retail Lumber Dealers' Ass'n v. United States, 342 U.S. 600, 611, 612 (1914); c.f., United States v. Standard Oil Co., 316 F.2d 884, 889 (7th Cir. 1963). See also United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665 (1964); 3 Devitt and Blackmar, Federal Jury Practice and Instructions, 3d § 90.07 at 155-56.

The Wisconsin Supreme Court has repeatedly held that there is no such thing as a civil action for conspiracy. Instead, there is an action for damages incurred by acts performed pursuant to the conspiracy. A recent expression of this rationale is contained in Onderdonk v. Lamb, 79 Wis.2d 241, 146-47, 255 N.W.2d 507 (1977), wherein the court stated:

> The gravamen of a civil action for damages resulting from an alleged conspiracy is thus not the conspiracy itself but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff. The resultant damages in a civil conspiracy action must necessarily result from overt acts, whether or not those overt acts in themselves are unlawful. Radue, supra at 244. Such a conclusion was reached by the federal court in Weise v. Reisner, 31 F. Supp. 580, 583 (E.D. Wis. 1970):
>
> . . . . However, in an action for civil conspiracy, it is not the conspiracy, as such, that constitutes the cause of action, but the overt acts that result from it. Thus, any concomitant damage to the plaintiffs stems from the acts done in furtherance of the conspiracy, not from the conspiracy itself. See Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959).

The necessity for overt acts is also reflected in the following passage from a 1977 decision of the supreme court:

> At a minimum, to show a conspiracy there must be facts that show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end. Augustine v. Anti-Defamation Lg. B'nai B'rith, 75 Wis.2d 207, 216, 249 N.W.2d 547 (1977). (Emphasis added.)

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The word "unlawful" need not be a criminal act since any willful, actionable violation of a civil right is sufficient. Cranston v. Bluhm, 33 Wis.2d 192, 198, 147 N.W.2d 337 (1967), appeal after remand 42 Wis.2d 425, 167 N.W.2d 236 (1969); Martens v. Reilly, 109 Wis. 464, 473,84 N.W. 840 (1901).

Conspiracy to Convert. A civil conspiracy entails two or more persons knowingly committing wrongful acts. Bruner v. Heritage Co., 225 Wis.2d 728, 593 N.W.2d 814 (Ct. App. 1999). A conspiracy to convert involves the knowing or intentional conversion of property. It contemplates an agreement to commit wrongful acts. Bruner, supra, at 738.

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2802 CONSPIRACY: PROOF OF MEMBERSHIP

Before you may find that a defendant, or any other person, was a member of a conspiracy, you must be satisfied that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

"To act or participate knowingly" means to act or participate voluntarily and intentionally and not because of mistake, accident, or other innocent reason. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the plan, he or she thereby becomes a knowing participant — a conspirator.

An unlawful conspiracy may exist even though all of the conspirators do not meet or agree simultaneously. Unlawful conspiracies may be formed without such simultaneous action or agreement on the part of the conspirators.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. It is not necessary that each member of the conspiracy knows exactly what part other members are playing. It is not necessary that each of the conspirators knows the identity or role of the other participants in the conspiracy.

One who knowingly joins an existing conspiracy is charged with the same responsibility as if he or she had been one of the originators or instigators of the conspiracy.

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Such a person is deemed to have adopted and assumed responsibility for everything done and said up to that time.

So, too, one who acquiesces, submits or tacitly assents to an illegal scheme is as much a conspirator as one who creates or promotes it. Even the fact that it may have been forced upon a person does not excuse such acquiescence.

In determining whether a defendant was a member of a conspiracy, you should not consider what others may have said or done. That is to say, the membership of a defendant in a conspiracy must be established by evidence in the case as to the person's own conduct, by what the person knowingly said or did.

[Burden of Proof, Wis JI-Civil 205]

COMMENT

This instruction was approved by the Committee in 1980 and revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. National City Lines, 186 F.2d 562 (7th Cir. 1951), cert. denied, 341 U.S. 916 (1951); 3 Devitt and Blackman, Federal Jury Practice and Instructions, 3d § 90.12 at 160.61; United States v. Wise, 329 F.2d 829 (9th Cir. 1964).

Joining an conspiracy after its formation: Lincoln v. Claflin, 74 U.S. (7 Wall.) 132 (1868); Hernandez v. United States, 300 F.2d 114, 122 (9th Cir. 1962); United States v. Bausch & Lomb Optical Co., 34 F. Supp. 267, 268 (S.D. N.Y. 1940); Van Riper v. United States, 13 F.2d 961, 1967 (2d Cir. 1926); United States v. Sanno, 456 F.2d 875, 878 (1st Cir. 1972).

Acquiescence in illegal scheme: United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

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2804 CONSPIRACY: INDIRECT PROOF

There are two types of evidence from which you may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence; that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you, the jury, find facts from the evidence.

A conspiracy may be, and often must be, proved by circumstantial evidence. Inferences arising from surrounding facts and circumstances are sufficient to prove a conspiracy. It is not necessary that the plaintiffs prove that there was an express agreement. Any conformance by a defendant to an agreed or contemplated pattern of joint conduct will warrant an inference of conspiracy.

You may consider the business behavior of the defendants in determining whether one or more of them engaged in a conspiracy, since the existence of a conspiracy may be inferred from such behavior.

Whether an unlawful conspiracy exists is to be proved by what the parties did, not necessarily by what they said. Conspiracy may be found in or inferred from a course of dealings or other circumstances, as well as through an exchange of words.

If you find that any defendant had a unity of purpose or common design and understanding or a meeting of the minds as to an unlawful arrangement with any of the defendants or with other persons, then you may find that a conspiracy has been established.

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COMMENT

This instruction and comment were approved in 1980. The instruction was revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's' 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The initial portion of this instruction is taken from 2 Devitt and Blackman,Federal Jury Practice and Instructions, 3d § 72.02 at 600. That a conspiracy may be proved from circumstantial evidence is supported by these authorities: 16N Von Kalinowski, Business Organizations-Antitrust Laws and Trade Regulations, § 112.05(4) at 112-17; Pennington v. United Mine Workers of America, 325 F.2d 804, 811 (6th Cir. 1963); Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 346 U.S. 537,540-41 (1954).

Express agreements need not be proved. Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969). Conspiracy may be inferred from conformance to an agreed to contemplated pattern of conduct. United States v. Twentieth Century Fox Film Corp., 137 F. Supp. 78 (S.D. Cal. 1955). Conspiracy may be inferred from business behavior. Norfolk Monument Co., supra.

Conspiracy is to be shown by what the parties did, not by what they said, and the jury may conclude that a conspiracy was established if they find the conspirators had a unity of purpose or common design and understanding or meeting of minds in an unlawful arrangement. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

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2806 CONSPIRACY TO BE VIEWED AS A WHOLE

In determining whether a conspiracy existed, you are not to isolate various acts and events and determine separately whether each was illegal, unfair, or unreasonable. Rather, you are to consider all of the evidence — all of the acts and events — as a whole in determining whether a conspiracy existed and, if so, its character and effects.

Acts in and of themselves lawful may nevertheless constitute or be a part of an illegal conspiracy if they are part of a concerted plan. Even lawful agreements, legal actions, and business activities may help make up a pattern of conduct that is unlawful.

COMMENT

This instruction and comment were approved in 1980. Nonsubstantive editorial changes were made to the instruction in 1993.

United States v. Patten, 226 U.S. 525 (1913), and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

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2808 CONSPIRACY BETWEEN AFFILIATED CORPORATIONS

INSTRUCTION WITHDRAWN.

COMMENT

This instruction was withdrawn by the committee in 2009. The withdrawn instruction (approved in 1980) read:

> Affiliated corporations are separate entities or "persons" in the eyes of the law. Accordingly, even though the defendants are affiliated, they are capable of conspiring with one another, as well as with others.

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation and its wholly-owned subsidiary were unable to conspire within the meaning of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (2000). The Supreme Court held that because of the complete unity of interests between a parent corporation and its wholly-owned subsidiary they could not conspire together for the purposes of antitrust law. The Copperweld decision overruled cases cited by this committee to support the former instruction.

There may be cases where it is disputed whether there is sufficient unity of interests between or among alleged co-conspirators for the intracorporate conspiracy doctrine articulated in Copperweld to apply. See Brew City Redevelopment Group v. The Ferchill Group, 2006 WI 128, ¶ 47-50, 297 Wis.2d 606, 724 N.W.2d 879. If the trial judge concludes that the intracorporate conspiracy doctrine does not apply because of insufficient unity of interest among affiliated defendants, then the trial judge may wish to instruct the jury that the affiliated entities are capable of conspiring with one another, as well as with others.

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2810 CONSPIRACY: OVERT ACTS

Question ___ asks whether any of those parties you may have found entered into an unlawful conspiracy (to deprive the plaintiff of business) performed any act to carry out the unlawful conspiracy.

You will answer this question only if you have found both [two or more] of the parties named in the previous question entered into an unlawful conspiracy (to deprive plaintiff of business [or other claimed unlawful deprivation]).

You will answer this question only if you are satisfied by evidence which is clear, satisfactory, and convincing, to a reasonable certainty, that any of the following acts were performed by any of the parties named in the question in furtherance or for the purpose of carrying out the conspiracy.

(List the overt acts which the evidence requires.)

COMMENT

This instruction and comment were approved in 1980. The instruction was revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

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2820 INJURY TO BUSINESS: WIS. STAT. § 134.01

Section 134.01 of the Wisconsin statutes makes it unlawful for two or more persons to act together to maliciously injure another person's reputation, trade, business, or profession.

(Plaintiff) claims that the (defendants) (defendant) and (_____) acted together in violation of this Wisconsin law to maliciously injure (his) (her) (reputation) (trade) (business) (profession).

To establish a violation, (plaintiff) must prove four things:

First, that the (defendants) (defendant) and (_____) acted together.

Second, that the (defendants) (defendant) and (_____) acted with a common purpose to injure the (plaintiff's) (reputation) (trade) (business) (profession).

Third, that the (defendants) (defendant) and (_____) acted maliciously in carrying out the common purpose.

Fourth, the acts of the (defendants) (defendant) and (_____) financially injured the plaintiff.

The first thing (plaintiff) must prove is that the (defendants) (defendant) and (_____) acted together. This means that they agreed, combined, associated or mutually undertook a common purpose.

The second thing (plaintiff) must prove is that the agreed upon purpose was to injure (plaintiff)'s (reputation) (trade) (business) (profession).

The third thing (plaintiff) must prove is that the persons who acted with the common purpose to injure the (plaintiff)'s (reputation) (trade) (business) (profession) acted

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maliciously; that is, with a malicious motive. For conduct to be malicious, it must be intended to cause harm for harm's sake. The harm must be an end in itself, and not merely a means toward some legitimate end.

The fourth thing the (plaintiff) must prove is that the harmful acts of the (defendants) (defendant) and (_____) financially injured (plaintiff). This means that (plaintiff) sustained economic damage as a result of the acts of the (defendants) (defendant) and (_____) in carrying out their malicious purpose.

[Burden of Proof, Wis. JI-Civil 205]

COMMENT

This instruction was approved in 2002. The comment was updated in 2008.

Section 134.01, Wis. Stats. prohibits two distinct illegal activities: (1) A conspiracy by two or more persons to wilfully and maliciously injure another in his or her reputation, trade, business or profession; and (2) a conspiracy by two or more persons to maliciously compel another to do an act against his or her will or to prevent or hinder another from doing or performing a lawful act. The leading Wisconsin case is Malecki v. Fine-Lando Clinic, 162 Wis.2d 73 (1991). See also Brew City Redevelopment Group v. The Ferchill Group, 2006 WI 128, 297 Wis.2d 606, 724 N.W.2d 879; Radue v. Dill, 74 Wis.2d 239, 245, 246 N.W.2d 507 (1976). In Brew City Redevelopment Group, the court said that while Wis. Stat. § 134.01 is a criminal statute, it provides the basis for civil tort liability (citing Radue).

The key difference between a conspiracy under this statute and a common law conspiracy is the requirement of malice. Malice is an integral element of a § 134.01 violation and must be proved in respect to all parties to the conspiracy. Allen & O'Hara v. Barrett Wreckers, Inc., 898 F.2d 512 (7th Cir. 1990).

Malecki makes clear that the conspirators must act maliciously; that is, all must act with the same specific malicious purpose. Id. at 85-86. (". . . whatever other evidence is produced, an essential element of the cause of action is the malicious motive of the conspirators sought to be charged.") Id. at 88.

There is no such thing as a civil action for conspiracy. See Malecki, supra; Brew City Redevelopment Group, supra, fn. 5. Instead, there is an action for damages incurred by acts performed pursuant to a conspiracy. Therefore, a § 134.01 action is not a statutory claim for conspiracy, rather it is a claim for the damages that occurred as a result of a § 134.01 conspiracy. Malecki makes clear that the essence of the legal action under § 134.01 are the damages that arise out of the conspiracy. ("In civil

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conspiracy, the essence of the action is the damages that arise out of the conspiracy, not the conspiracy itself."). Id. at 87.

Although the statute uses both the terms "wilfully and maliciously" in the first section, Justice Holmes in the U.S. Supreme Court case, Aikens v. Wisconsin, 195 U.S. 194, (1904), pointed out that the words must be read conjunctively and not disjunctively. Wisconsin law has accepted this interpretation. (Malecki at 91, ftnt. 10)

Malecki makes clear that § 134.01, Stats., requires that there be a conspiracy of two or more persons. The prohibited conduct, if done by one acting alone, is not a violation of § 134.01. Id. at 88 citing Hawarden v. The Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 550 (1901).

Where a key issue in the case is the nature and purpose of the conspiracy, the following language may be considered and added to the jury instruction:

> Competition that incidentally harms another when the purpose is to improve one's competitive advantage is not malicious if it is not done with a malicious motive or purpose.

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2822 RESTRAINT OF WILL: WIS. STAT. § 134.01

Section 134.01 of the Wisconsin statutes makes it unlawful for two or more persons, acting together, to maliciously compel another to perform an act against his or her will or to maliciously prevent or hinder another from performing a lawful act.

(Plaintiff) claims that the (defendants) (defendant) and (_____) acted together in violation of this Wisconsin law to maliciously injure (him) (her) by [compelling (him) (her) to] [preventing or hindering (him) (her) from] _____ (state the act) _____.

To establish a violation, (plaintiff) must prove four things:

First, that the (defendants) (defendant) and (_____) acted together.

Second, that the (defendants) (defendant) and (_____) acted with a common purpose to (compel plaintiff to) (prevent or hinder plaintiff from) _____ (state the act) _____.

Third, that the (defendants) (defendant) and (_____) acted maliciously in carrying out the common purpose.

Fourth, the acts of the (defendants) (defendant) and (_____) financially injured the plaintiff.

The first thing (plaintiff) must prove is that the (defendants) (defendant) and (_____) acted together. This means that they agreed, combined, associated or mutually undertook a common purpose.

The second thing (plaintiff) must prove is that the agreed upon purpose was to (compel plaintiff to) (prevent or hinder plaintiff from) _____(state the act) _____.

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The third thing (plaintiff) must prove is that the persons who acted with the common purpose to compel (plaintiff) to perform an act against (his) (her) will or prevent or hinder (him) (her) from performing a lawful act, acted maliciously; that is, with a malicious motive. For conduct to be malicious, it must be intended to cause harm for harm's sake.

The fourth thing the (plaintiff) must prove is that the harmful acts of the (defendants) (defendant) and (_____) financially injured (plaintiff). This means that (plaintiff) sustained economic damage as a result of the acts of the (defendants) (defendant) and (_____) in carrying out their malicious purpose.

[Burden of Proof, Wis. JI-Civil 205]

COMMENT

This instruction was approved in 2002. See comments to Wis JI-Civil 2820, § 134.01: Injury to Business.

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LAW NOTE FOR TRIAL JUDGES

2900 TORT IMMUNITY: IMMUNITIES ABROGATED

No instruction is necessary on the question of immunity. Following is a list of the immunities which have been abrogated.

1. Immunity of parent against action by unemancipated minor child. Eliminated by Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963). Effective date: June 28, 1963.

2. Immunity of unemancipated minor child against action by parent. Eliminated by Ertl v. Ertl, 30 Wis.2d 372, 141 N.W.2d 208 (1966). Effective date: June 28, 1963.

3. Immunity of husband against action by wife. Eliminated by Wait v. Pierce, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926). Effective date: March 19, 1881, date of publication of Chapter 99, Laws of 1881, Wis. Stat. § 246.07 (1965).

4. Immunity of wife against action by husband. Eliminated by Wis. Stat. § 246.075 (1965) (as to personal injuries only). Effective date: May 24, 1947, date of publication of Chapter 164, Laws of 1947.

5. Immunity of charitable organizations.

a. As to paying hospital patients. Eliminated by Kojis v. Doctors Hosp., 12 Wis.2d 367,107 N.W.2d 131, 107 N.W.2d 292 (1961). Effective date: January 10, 1961.

b. As to nonpaying, charitable, or indigent patients. Eliminated by Duncan v. Steeper, 17 Wis.2d 226, 116 N.W.2d 154 (1962). Effective date: January 10, 1961.

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6. Immunity of religious organizations. Eliminated by Wedell v. Holy Trinity Catholic Church, 19 Wis.2d 648, 121 N.W.2d 249 (1963). Effective date: July 1, 1963.

7. Immunity of governmental bodies. Eliminated by Holytz v. Milwaukee, 17 Wis.2d 26,115 N.W.2d 618 (1962). Effective date: July 15, 1962.

8. Immunity from direct action of "no-action clause" insurers, with respect to accidents outside of Wisconsin. Eliminated by Chapter 14, Laws of 1967 (Wis. Stat. § 260.11(1)). Effective date: April 1, 1967 (see Miller v. Wadkins, 31 Wis.2d 281, 142 N.W.2d 855 (1965)).

9. Immunity of tortfeasor from suit by wife for loss of husband's consortium. Eliminated by Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 137 (1966). Effective date: July 15, 1921. (Date of publication of Chapter 529, Laws of 1921, enacting Wis. Stat. § 6.015, now § 246.15.)

COMMENT

This law note was approved by the Committee in 1969. Nonsubstantive editorial changes were made in 1993.

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3010 AGREEMENT

For a contract to be binding, three things must concur: first, the offer; second, the acceptance; and third, the consideration.

For the parties to come to an agreement, it is necessary that there be a meeting of the minds of the parties upon the essential terms and conditions of the subject about which they are agreeing; that is, they must be in accord upon the essential terms and conditions. There must be a mutual assent.

The language used and the conduct of the parties must disclose sufficiently the fact that the minds of the parties have met, or have been in accord, on all the terms of the agreement, or, in other words, disclose the fact that there has been a mutual assent. One party cannot make an agreement; both parties must, by their words or actions, assent to the agreement.

Usually, the form of an agreement is that one party makes an offer and the other party accepts the offer.

[An agreement may be written, oral, or partially written and partially oral.]

COMMENT

This instruction and comment were approved in 1975 and revised in 2004. A spelling error was corrected in 2010.

See, generally, 17 Am. Jur. Contracts § 18 et seq; Ballentine's Law Dictionary (2d ed.) 59.

Elements: Briggs v. Miller, 176 Wis. 321, 186 N.W. 163 (1922).

The definiteness requirement as mutual consent, or "meeting of the minds," does not mean that parties must subjectively agree to the same interpretation at the time of contracting. Management Computer Services v. Hawkins, Ash, Baptie, 206 Wis.2d 158, 557 N.W.2d 67 (1996). See also Kernz v. J.L. French Corp., 2003 WI App 140, 266 Wis.2d 124, 667 N.W.2d 751. The key is not necessarily what the parties intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit.

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If parties evidentially intended to enter a contract, the trier of fact should not frustrate their intentions but rather should attach a sufficiently definite meaning to the contract language if possible. The supreme court has also said that even though the parties have expressed an agreement in terms so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty, they may cure this defect by their subsequent conduct and by their own practical interpretation. Nelson v. Farmer's Mut. Automobile Ins. Co., 4 Wis.2d 36, 90 N.W.2d 123 (1958). Therefore, the court said in Management Computer Service, supra, that if the jury can determine the parties' intentions, indefiniteness disappears as a reason for refusing enforcement. Parties do not need to agree subjectively to the same interpretation at the time of contracting in order for there to be a mutual assent because a literal meeting of the minds is not required. Instead, mutual assent is judged by an objective standard, looking to the express words the parties used in the contract. Second, when parties disagree about their intentions at the time they entered into a contract, the question is one of contract interpretation for the jury, not mutual assent or contract formation. In fact, if a disagreement between parties as to their intent could support a claim of indefiniteness, juries would rarely be called upon to interpret a contract because nearly every contract challenged in court would be void for indefiniteness. Management Computer Services v. Hawkins, Ash, Baptie, supra. The supreme court also said that parties often agree to a contract provision that is ambiguous and thereby gamble on a favorable interpretation should a dispute arise, rather than take the time to work out all possible disagreements, especially since such disagreements may never have any consequence. When this occurs, the entire contract is not void for indefiniteness; instead, the parties submit to have any dispute over interpretation resolved by a jury. This is the function of a jury in a contract case—to resolve interpretive questions founded on ambiguity.

In Management Computer Services v. Hawkins, Ash, Baptie, supra, the supreme court said it is well established that a material breach by one party may excuse subsequent performance by the other. However, a party is not automatically excused from future performance of contract obligations every time the other party breaches. If the breach is relatively minor and not of the essence, the plaintiff is himself or herself still bound by the contract; he or she cannot abandon performance and get damages for a total breach by the defendant. In other words, there must be so serious a breach of the contract by the other party as to destroy the essential objects of the contract. Moreover, even where such a material breach has occurred, the nonbreaching party may waive the claim of materiality through its actions.

The issue of whether a party's breach excuses future performance of the contract by the nonbreaching party presents a question of fact. The restatement of contracts lists several circumstances relevant to this determination, including the extent to which the injured party will be deprived of the benefit that he or she reasonably expected, and the extent to which the injured party can be adequately compensated for his or her loss. Restatement (Second) of Contract §§ 241, 242 (1981). In Management Computer Services, supra, the court said the special verdict used by the trial court was not sufficient to support the circuit court's determination that the jury, in considering the evidence that was presented without doubt, found that the plaintiff's breach was a material breach of the contract, particularly in light of the lack of instruction the jury received on the issue.

For a discussion of how to structure the special verdict on a material breach issue, see Management Computer Services v. Hawkins, Ash, Baptie, supra.

An agreement so vague as to be incapable of a reasonably certain interpretation may be cured by the parties' subsequent conduct and their own practical interpretation. Nelsen v. Farmers Mut. Auto Ins. Co.,4 Wis.2d 36, 51, 90 N.W.2d 123 (1958); 1 Corbin, Contracts § 101 (1950, Supp. 1960).

An acceptance which varies from the offer in respect to essential terms amounts to a rejection. Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n, 238 Wis. 39, 298 N.W. 226 (1941).

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3012 OFFER: MAKER

The person making an offer is called the offeror; the person to whom the offer is made is called the offeree.

An offer is a communication by an offeror of what he or she will give or do in return for some act or promise of the offeree. An offer may be addressed to a particular individual or to the public, but must look to the future and be promissory in nature.

A mere expression of intention, opinion, or prophecy is not an offer. A communication intended merely as a preliminary negotiation or willingness to negotiate is not an offer.

While no particular form of words or mode of communication is necessary to create an offer, it must reasonably appear that the alleged offeror has agreed to do the thing in question for something in return. An offer must be so definite in its terms, or require such definite terms in acceptance, that the promises and performances to be rendered by each party are reasonably certain.

When an offer is made, it is presumed to continue for the period of time expressed or, if no time limit is expressed, for a reasonable time.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Offer: Estate of Lube, 225 Wis. 365, 368, 274 N.W. 276 (1937); 17 Am. Jur. 2d Contracts § 34; Goetz v. State Farm Mut. Auto Ins. Co., 31 Wis.2d 267, 273, 142 N.W.2d 804 (1966); Moulton v. Kershaw, 59 Wis. 316, 18 N.W. 172 (1884).

Definiteness: 5 Williston on Contracts (3rd Ed) § 670; Restatement Contracts § 32; Machesky v. Milwaukee, 214 Wis. 411, 253 N.W. 169 (1934); Petersen v. Pilgrim Village, 256 Wis. 621, 42 N.W.2d 273 (1950).

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Continuance of offer: Sherley v. Peehl, 84 Wis. 46, 52, 54 N.W. 267 (1893); Conrad Milwaukee Corp. v. Wasilewski, 30 Wis.2d 481, 485, 141 N.W.2d 240 (1966); 17 Am. Jur. 2d Contracts § 35.

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3014 OFFER: ACCEPTANCE

To create a contract, an offer must be accepted by one having the right to accept, while the offer is still open. Acceptance of an offer is an assent by the offeree to its terms without qualification; acceptance may be made by a communication to the offeror, either in writing or orally; acceptance may also be implied from the conduct of the parties.

If the offer requires the acceptance to be communicated to the offeror in a specified manner, there is an effective acceptance if the acceptance is made in that manner. If the manner of communicating the acceptance has not been specified, any reasonable manner or means of communication may be used. In either case, if actual notice of the acceptance reaches the offeror while the offer is still open, it makes no difference how it reached the offeror.

An attempted acceptance coupled with any condition that varies or adds to the offer amounts to a rejection of the offer and is instead the submission of a counteroffer. However, a mere suggestion, inquiry, or request which is not made a condition of acceptance and which does not vary the terms of the offer will not defeat the acceptance.

[Where goods or merchandise are involved, a definite and seasonable expression of acceptance, or a written confirmation which is sent within a reasonable time, operates as an acceptance, even though it states terms additional to or different from those offered or agreed upon, unless such terms materially alter the contract or are seasonably objected to by the offeror.]

An offeree has a right to make no reply to an offer, and his or her silence or inaction cannot be construed as an acceptance unless the relationship between the parties has been such as to give the significance of an acceptance to silence or inaction.

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If the offer asks the offeree for a promise, the making of the promise is an acceptance. If the offer asks the offeree for an act, the commencement of the act by the offeree is the acceptance.

[But where goods are involved, the commencement of performance by an offeree can be effective as an acceptance so as to bind the offeror only if commencement is followed within a reasonable time by notice to the offeror.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Acceptance: 17 Am. Jur. 2d Contracts § 41; Morris F. Fox & Co. v. Lisman, 208 Wis. 1, 237 N.W. 267, 240 N.W. 809, 242 N.W. 679 (1932); Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 346, 118 N.W. 853 (1908).

Communication of acceptance: Wis. Stat. § 402.26(1)(a); Zimmerman Bros. & Co. v. First Nat'l Bank, 219 Wis. 427, 431, 263 N.W. 361 (1935); 17 Am. Jur. 2d Acceptance § 43, p. 381.

Counteroffer: Hess v. Holt Lumber Co., 175 Wis. 451, 185 N.W. 522 (1921); Todorovich v. Kinnickinnic Mut. Loan & Bldg Ass'n, 238 Wis. 39, 298 N.W. 226 (1941); Leuchtenberg v. Hoeschler, 271 Wis. 151, 155, 72 N.W.2d 758 (1955).

Counteroffer by merchants: Wis. Stat. § 402.207.

Effect of silence: Sell v. General Elec. Supply Corp., 227 Wis. 242, 253, 278 N.W. 442 (1938).

Acceptance by promise or act: Restatement Contracts § 52.

Acceptance by performance in sale of goods: Wis. Stat. § 402.206(2).

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3016 OFFER: REJECTION

Failure of the offeree to accept the offer either according to its material terms, or within a reasonable time, may be treated as a rejection. Having once rejected the offer, the offeree cannot revive it by subsequently tendering an acceptance.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Kukuska v. Home Mut. Hail-Tornado Ins. Co., 204 Wis. 166, 170, 235 N.W. 403 (1931).

1 Williston on Contracts (3d ed.) § 37, § 73; Cass v. Haskins, 154 Wis. 472, 143 N.W. 162 (1913).

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3018 OFFER: REVOCATION

An offer may be revoked by a communication from the offeror received by the offeree before the offeree accepts, which communication states or implies that the offer is withdrawn.

[An offer to buy or sell goods, in writing and signed by a merchant, which contains an assurance that the offer will continue, is not revocable during the time stated or, if no time is stated, for a reasonable time.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 41; Frank v. Metropolitan Life Ins. Co., 227 Wis. 613, 618, 277 N.W. 643 (1938); Larson v. Superior Auto Parts, 275 Wis. 261, 270, 81 N.W.2d 505 (1956).

Offer by merchant: Wis. Stat. § 402.205.

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3020 CONSIDERATION

[Insert first paragraph of 3010 and first paragraph of 3012 if desired.]

Consideration is an essential element of a contract; it is necessary to the validity and enforceability of a contract.

Consideration is the price bargained and paid for a promise — that is, something intended by the parties to be given in exchange for the promise.

Consideration is an act or a promise which is either a detriment incurred by the offeree, or a benefit received by the offeror, at the request of the offeror, either of which does not occur gratuitously, but which is accepted and regarded as consideration by both the offeror and the offeree. Detriment as used here means any act which occasioned the offeree the slightest trouble or inconvenience, and which the offeree was not otherwise obliged to perform or refrain from performing. Benefit as used here means anything of slight or trifling value to the offeror.

[For a detriment to the offeree, or a benefit to the offeror, to rise to the status of consideration in a legal sense, the forbearance, detriment, loss or responsibility borne by the one party, or the right, interest, profit or benefit accruing to the other party, must not consist of an already existing legal obligation.]

It is not a proper function of the jury to determine whether the consideration is a fair and adequate exchange for the promise. Fairness and adequacy are for the offeror and offeree to judge for themselves. Any legal consideration, no matter how slight, will be sufficient. However, the mere inconvenience of making or receiving a promise is not itself consideration. [Love and affection alone are not sufficient to support a contract.]

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[If consideration is sufficient in other respects, it does not matter from whom or to whom it moves. The consideration may move to the offeror or a third person, and may be given by the offeror or a third person.]

[Mutual promises for the future performance of acts by the parties may constitute consideration for each other if the promises are capable of being performed, are given in exchange for each other, and are mutually binding upon the parties. The promises must be equally binding upon both parties, but it is not necessary that the value of the promises be equal.]

[Something given or received before the time a promise is made, and therefore without reference to such promise, is past consideration which is not sufficient to support a contract.]

[A moral obligation may operate as consideration where the offeror has previously received a material pecuniary benefit from the offeree who expected to be compensated therefor and who was not under an existing legal or moral duty to confer the benefit without compensation. Thus, reaffirmation of a past legal obligation, such as a debt that has been discharged in bankruptcy, is sufficient consideration.]

[In order that forbearance to sue upon a claim may constitute a valid consideration, the claim need not be one which could be successfully prosecuted, but the claim must not be brought in bad faith, or be frivolous or vexatious.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Consideration; benefit; detriment: Briggs v. Miller, 176 Wis. 321, 325, 186 N.W. 163 (1922); 17 Am. Jur. 2d Contracts §§ 85, 92, 97; Restatement Contracts § 75; Home Savings Bank v. Gertenbach, 270 Wis. 386, 395, 71 N.W.2d 347, 72 N.W.2d 697 (1955); Onsrud v. Paulsen, 219 Wis. 1, 261 N.W. 541 (1935); Barr

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v. Granahan, 255 Wis. 192, 196, 38 N.W.2d 705 (1949); 1 Williston Contracts (3d ed.) §§ 102, 102A; First Wisconsin National Bank v. Oby, 52 Wis.2d 1,5, 6, 188 N.W.2d 454 (1971); Estate of Hatten, 233 Wis. 199, 216, 288 N.W. 278 (1940).

Existing legal obligation: Beacon Fed. Savings & Loan Ass'n v. Panoramic Enterprises, Inc., 8 Wis.2d 550, 99 N.W.2d 696 (1959).

Adequate consideration: Estate of Hatten, supra; 17 Am. Jur. 2d Contracts § 102; Briggs v. Miller, supra.

Love and affection: Estate of Briese, 240 Wis. 426, 431, 3 N.W.2d 691 (1942).

Consideration to or from a third person: Durand West, Inc. v. Milwaukee Western Bank, 61 Wis.2d 454,460, 213 N.W.2d 20 (1973).

Mutual promises: Stack v. Roth Bros. Co., 162 Wis. 281,156 N.W. 148 (1916); Atlee v. Bartholomew, 69 Wis. 43, 33 N.W. 110 (1887); Levin v. Perkins, 12 Wis.2d 398, 107 N.W.2d 492 (1961).

Past consideration: Chudnow Constr. Corp. v. Commercial Discount Corp., 48 Wis.2d 653, 180 N.W.2d 697 (1970); 17 Am. Jur. 2d Contracts § 125.

Moral obligation: Estate of Schoenkerman, 236 Wis. 311, 313,294 N.W. 810 (1940); Cohen v. Lachenmaier, 147 Wis. 649, 652, 133 N.W. 1099 (1912); McLean v. McLean, 184 Wis. 495, 199 N.W. 459 (1924); First Trust Co. v. Holden, 168 Wis. 1,168 N.W. 402 (1918).

Forbearance to sue: Elmergreen v. Kern, 174 Wis. 622, 182 N.W. 947 (1921).

Promissory estoppel as consideration: Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1965). 17 Am. Jur. 2d Contracts § 89.

A seal on a written contract imports only a rebuttable presumption of consideration. Wis. Stat. § 891.27; Schwartz v. Evangelical Deaconess Society of Wisconsin, 46 Wis.2d 432, 441, 175 N.W.2d 225 (1970).

If any part of the consideration for a promise is illegal, the promise is void, for it is impossible to say what part of the consideration induced the promise. Menominee River Boom Co. v. Augustus Spies Lumber & Cedar Co., 147 Wis. 559, 571, 132 N.W. 1118 (1912).

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3022 DEFINITENESS AND CERTAINTY

A vague or indefinite agreement is not enforceable as a contract. The subject of the agreement, the object to be accomplished, and the requirements as to performance must be clear.

It is not enough that the parties think they have made a contract if they have not expressed their intentions in a manner that can be understood. It is not even enough that they have actually agreed on some matter or matters if their expression of agreement, when interpreted in the light of accompanying facts and circumstances, is not such that the essential terms of the contract can be determined. For example, an agreement which provides only that one party is to receive something but which does not supply, either expressly or by implication, any standard by which performance can be measured is unenforceable due to indefiniteness and uncertainty.

If it is apparent that the parties intended to enter into a contract, and if the conduct of the parties in the surrounding circumstances will reasonably permit omitted terms to be inferred, the contract is not indefinite. But where the parties have indicated an intention to leave some essential matter to be agreed upon in the future, no provision as to that matter omitted can be inferred, for the jury may neither write nor rewrite an agreement between the parties, nor supply any essential term.

Where the parties disagree in their recollection concerning the provisions of an oral contract, the jury must determine what the provisions were.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

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Words which fix an ascertainable fact or event by which the term of contract duration can be determined make the contract definite and certain in that particular. Pallange v. Mueller, 206 Wis. 109, 238 N.W. 815 (1931).

See Wis. Stat. § 402.305 concerning open price term

See Wis. Stat. § 402.306 regarding the enforceability of output, requirements, and exclusive dealing contracts. (Contra Hoffman v. Pfingsten, 260 Wis. 160, 50 N.W.2d 369 (1951).) Also see Comment, 1964 Wis. L. Rev. 684.

Indefiniteness: Shetney v. Shetney, 49 Wis.2d 26,38,39, 181 N.W.2d 516 (1970); Taylor v. Bricker, 262 Wis. 377, 379,55 N.W.2d 404 (1952); 1 Corbin on Contracts § 95; 1 Williston on Contracts (3d ed.) § 37; Freeman v. Morris, 131 Wis. 621, 627, 42 N.W.2d 273 (1950).

Contract term inferred: Dreazy v. North Shore Publishing Co., 53 Wis.2d 38,44, 191 N.W.2d 720 (1971); Kelley v. Ellis, 272 Wis. 333, 337, 75 N.W.2d 569 (1956).

Jury function: Dreazy, supra.

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3024 IMPLIED CONTRACT: GENERAL

[Use paragraphs of Wis JI-Civil 3010 if appropriate.]

An agreement may be established by the conduct of the parties without any words being expressed in writing or orally, if from such conduct it can fairly be inferred that the parties mutually intended to agree on all the terms. This type of agreement is known as an implied contract. An implied contract may rest partially on words expressed in connection with conduct or solely upon conduct.

[If a party expressly declares that it is not his or her intention to make a contract, an implied promise may not be found and enforced against the party.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

17 Am. Jur. 2d Contracts § 3, p. 334; Williston, Contracts § 22(a); Restatement Contracts § 21; Gerovac v. Hribar Trucking, Inc., 43 Wis.2d 328, 168 N.W.2d 863 (1969).

"[T]he conduct and words of the parties can imply a contract." California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 20 Wis.2d 110, 122, 121 N.W.2d 308 (1963).

"[I]f a person performs valuable services for another at his request, the law implies the making of a promise by the latter and acceptance thereof by the former to pay the one performing service the reasonable value thereof." Estate of Ansell, 2 Wis.2d 1, 6, 85 N.W.2d 786 (1957); citing Estate of St. Germain, 246 Wis. 409,17 N.W.2d 582 (1945).

"A contract implied in fact may arise from an agreement circumstantially proved, but even an implied contract must arise under circumstances which show a mutual intention to contract. The minds of the parties must meet on the same thing." Kramer v. Hayward, 57 Wis.2d 302, 306-07, 203 N.W.2d 871 (1973).

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3026 IMPLIED CONTRACT: PROMISE TO PAY REASONABLE VALUE

[Use paragraphs of Wis JI-Civil 3024 if appropriate.]

If a person performs services, furnishes property, or expends money for another at the other's request and there is no express agreement as to compensation, a promise to pay the reasonable value of the services or property or to reimburse for money expended may be properly implied; there must be some conduct of the person benefited from which his or her free election to promise to pay may be fairly inferred.

A promise to pay will not be implied where the service or other benefit was intended by the performer as a gratuity, or without expectation of payment.

If a party expressly declares that it is not his or her intention to make a contract, an implied promise may not be found and enforced against the party.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Wojahn v. National Union Bank of Oshkosh, 144 Wis. 646, 129 N.W. 1068 (1911); Klug v. Sheriffs, 129 Wis. 468, 109 N.W. 656 (1906).

Gratuity: Segnitz v. A. Grossenbach Co., 158 Wis. 511, 149 N.W. 159 (1914). See Wis. Stat. § 401.208 on commercial customs and usages.

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3028 CONTRACTS IMPLIED IN LAW (UNJUST ENRICHMENT)

This case involves a claim based upon alleged unjust enrichment.

The elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge or appreciation of the benefit by the defendant; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be unfair for him or her to retain it without paying the value thereof.

A claim of unjust enrichment does not arise out of an agreement entered into by the parties.

It is not necessary to prove that the recipient of the benefit was at fault or guilty of wrongdoing in any way, but it must be established that as between the parties it would be unfair for the recipient to retain the benefit without paying the reasonable value of the benefit.

A benefit to the defendant may be (services rendered for (defendant)) (goods or merchandise received by (defendant)) (improvements to (defendant)'s real estate) (money paid to (defendant) or someone else on (defendant)'s behalf).

A loss to the plaintiff without an actual benefit to the defendant is not recoverable as unjust enrichment.

If a person declines in advance a benefit to be conferred by another, then the person conferring the benefit may not recover for unjust enrichment.

[It is not a defense to the action that (defendant) is a minor or otherwise incompetent to make a contract, but a minor may show that in equity and good conscience, (plaintiff) is not entitled to recover in whole or in part.]

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[In this case, (plaintiff) has alleged fault or wrongdoing on the part of (defendant) (fraud) (duress) (nonperformance or breach of contract) which is elsewhere in these instructions defined for you. The burden of proof is on (plaintiff) to establish wrongdoing by (defendant).]

COMMENT

This instruction was originally approved by the Committee in 1979. Editorial changes were made in 2015. This revision of the instruction and comment were approved by the Committee in 2020.

In cases where an unjust enrichment claim is based on contributions made by one party for the benefit of another, the unjust enrichment claim must demonstrate that, viewed in their entirety, the contributions were made to a "joint enterprise" in which the parties were mutually engaged, and which resulted in an accumulation of wealth that a party had unfairly retained. See Sands v. Menard, 2017 WI 110 at pg. 23.

"A claim for unjust enrichment may exist when two people work together or when two people combine assets for defendant's benefit." See Lawlis v. Thompson, 137 Wis.2d 490 at pg. 493.

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3030 MODIFICATION BY MUTUAL ASSENT

One party to an existing contract cannot alter its provisions without the consent of the other party. In order that any new provisions may become part of an existing contract, it is necessary that there be a meeting of the minds of the parties on all essential terms and conditions of the new provisions. The parties must agree that the new provisions are to be made part of the existing contract. The usual procedure in modifying a contract is for one party to propose a modification and for the other party to assent to the proposal.

A modification of a contract may be written, oral, or partially written and partially oral. Regardless of whether a prior contract is oral or written, it may be modified orally.

To constitute a modification, the language used and the conduct of the parties must show that there has been a meeting of the minds of the parties on all terms of the contract modification.

[No new consideration is required to support modification of a contract which has not been fully performed.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Consent necessary: Meyers v. Wells, 252 Wis. 352,31 N.W.2d 512 (1948); Weil v. Biltmore Grande Realty Corp., 251 Wis. 13, 27 N.W.2d 713 (1947).

Meeting of the minds: 17A C.J.S. Contracts § 375; 17 Am. Jur. 2d Contracts § 465.

Oral modification: Gutknechtv. C. A. Lawton Co., 231 Wis. 413, 285 N.W. 411 (1939); ABC Outdoor Advertising, Inc. v. Dolhun's Marine, Inc., 38 Wis.2d 457, 157 N.W.2d 680 (1967); Wis. Stat. § 402.209(3).

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New consideration unnecessary: Everlite Mfg. Co. v. Grand Valley Machine & Tool Co., 44 Wis.2d 404, 171 N.W.2d 188 (1969); Wis. Stat. § 402.209(1).

If the original contract was required by the statute of frauds to be in writing, it cannot be modified orally; this termination is made by the judge, and in such case, paragraph 2 would not be given.

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3032 MODIFICATION BY CONDUCT

If you determine that one party to a contract has performed in a manner differing from the strict obligations imposed on him or her by the contract, and the other party by conduct or other means of expression induced a reasonable belief by the first party that strict performance was not insisted upon, but that the modified performance was satisfactory and acceptable as equivalent, you may then conclude that the parties have assented to a modification of the original terms of the contract and that the parties have agreed that the different mode of performance will satisfy the obligations imposed on the parties by the contract.

The acts which are relied upon to show modification of a contract may not be ambiguous in character. Acts which are ambiguous, and which are consistent either with the continued existence of the original contract or with a modification, are not sufficient to establish a modification.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Will of Bate, 225 Wis. 564, 275 N.W. 450 (1937); 17A C.J.S. Contracts § 375.

Ambiguity: Nelsen v. Farmers Mut. Automobile Ins. Co., 4 Wis.2d 36, 90 N.W.2d 123 (1958).

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3034 NOVATION

The parties to a contract may mutually agree to create a new contract which discharges their legal obligations under the original contract by [the substitution of a new obligation between the same parties with intent to extinguish the old obligation] [the substitution of a consenting new debtor in place of the old debtor, with intent to release the old debtor] [the substitution of a consenting new creditor in place of the old creditor, with intent to transfer the rights of the old creditor to a new creditor].

If the parties intended only to modify the contract or to expand or diminish the obligations thereunder, then the contract is not discharged.

Consideration and a meeting of the minds of all parties to the new contract are required before discharge of the original contract can be found. However, it is not required that the agreement to discharge the original contract be shown by express words, for it may be implied from the circumstances of the relationship and the conduct of the parties.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Navine v. Peltier, 48 Wis.2d 588, 180 N.W.2d 613 (1970); 58 Am. Jur. 2d §§ 1, 3; 58 Am. Jur. 2d § 23.

Consideration: Bohn Mfg. Co. v. Reif, 116 Wis. 471, 93 N.W. 466 (1903).

Novation implied: Bishop-Babcock Co. v. Keeley, 160 Wis. 546, 152 N.W. 189 (1915).

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3040 INTEGRATION OF SEVERAL WRITINGS

[Separate writings that have been executed at or about the same time between the same parties and in relation to a common transaction may be considered as one agreement which is known as an integrated contract. It is for the jury to determine whether or not the separate writings were intended by the parties to be an integrated contract.]

[Writings executed at the same time as one transaction in order to effectuate a single purpose, and referring to one another, must be considered together as an integrated contract.]

Separate writings which constitute an integrated contract must be construed together as to all persons who had notice of their contents and their relation to each other for the purpose of determining the character of the transaction and the true intent and agreement of the parties.

To be taken together as evidencing an integrated contract, the writings must not only relate to a common transaction, but must have the same objective. It is for the jury to determine the overall agreement of the parties from the several writings.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Common transaction: Norton v. Kearney, 10 Wis. 386 (1860); Bank of Sheboygan v. Fessler, 218 Wis. 244, 260 N.W. 441 (1935).

Single purpose: 17 Am. Jur. 2d § 263; Bailey v. Hovde, 61 Wis.2d 504, 213 N.W.2d 69 (1973).

Construed together: Fessler, supra.

Same objective: Brest v. Maenat Realty, 245 Wis. 631, 15 N.W.2d 798 (1944).

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It is for the court to determine preliminarily whether or not two writings are so related that the provisions of one are necessarily to be imported into the other. Seaman v. McNamara, 180 Wis. 609, 193 N.W. 377 (1923); Thorp v. Mindeman, 123 Wis. 149, 101 N.W. 417 (1904).

If, after integration, there are remaining unrelated and nonintegrated provisions, they must be given effect as independent instruments. Construction of separate writings in insurance contracts: Martell v. National Guardian Life Ins. Co., 27 Wis.2d 164, 133 N.W.2d 721 (1965).

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3042 PARTIAL INTEGRATION — CONTRACT PARTLY WRITTEN, PARTLY ORAL

A contract may be partly written and partly oral. It is for the jury to determine whether the oral and written provisions were intended by the parties to be an integrated contract.

In determining whether the oral and written provisions were intended by the parties to constitute an integrated contract, you are cautioned that prior or concurrent oral provisions which contradict the written provisions cannot be considered by you.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

17 Am. Jur. 2d Contracts § 68; Hannon v. Kelly, 156 Wis. 509, 512, 146 N.W. 512 (1914); Conrad Milwaukee Corp. v. Wasilewski, 30 Wis.2d 481, 141 N.W.2d 240 (1966).

Necessity for and elements of a writing: Wis. Stat. §§ 241.02, 401.206, 402.201, 408.319, 409.203.

This instruction is proper only if the court has determined that the parol evidence rule does not apply. Paragraph 2 must not be used to assign to the jury the decision whether or not the rule should apply.

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3044 IMPLIED DUTY OF GOOD FAITH (PERFORMANCE OF CONTRACT)

Question _____ asks whether (defendant) breached the duty of good faith in performing (his) (her) contract with (plaintiff).

Under Wisconsin law, the contract between (defendant) and (plaintiff) requires that each party act in good faith towards the other party and deal fairly with that party when (performing) (enforcing) (carrying out) the expressed terms of the contract. This requirement to act in good faith is a part of the contract just as though the contract stated it.

In this case, the plaintiff claims defendant had an obligation to use good faith when performing the following contractual term: (insert contractual term).

As to this term, (plaintiff) claims that (defendant) breached the contract's good faith obligation by: (insert relevant conduct).

Whether the duty to act in good faith has been met in this case should be determined by deciding what the contractual expectations of the parties were. Therefore, in deciding whether the defendant breached the duty of good faith by (e.g., terminating the contract, invoking the force majeure clause), you should determine the purpose of the agreement; that is, the benefits the parties expected at the time the agreement was made.

This duty of good faith means that each party to a contract will not do something which will have the effect of injuring or destroying the (rights) (ability) of the other party to receive the benefits of the contract.

[A contracting party can breach the duty of good faith even if (he) (she) did not violate any express term of the contract.]

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[It is not a breach of the duty of good faith if a course of action available to (plaintiff) could have avoided the harm and this course was not followed.]

SPECIAL VERDICT

Did (defendant) breach the duty of good faith in performing (his) (her) contract with (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were first approved in 1975 and revised in 1998. The comment was updated in 2006.

This instruction addresses only the duty of good faith in the performance of a contract. It does not cover negotiations. Under Hauer v. Union State Bank of Wautoma, 192 Wis.2d 576, 598, 532 N.W.2d 456 (Ct. App. 1995), there can be an implied duty of good faith during negotiation and formation in a non-UCC case. But there may be a lesser duty during this time. Market Street Assoc. Ltd. Ptrshp. v. Frey, 941 F.2d 588, 594-96 (7th Cir. 1991). Tort liability for the breach of the duty of good faith is limited to cases involving insurance companies. Foseid v. State Bank of Cross Plains, 197 Wis.2d 772, 792, 541 N.W.2d 203, 211 (Ct. App. 1995). Hauer v. Union State Bank of Wautoma, supra at 595. See Wis JI-Civil 2760, 2761.

Absent proof of an underlying tort, punitive damages are not recoverable for breach of the duty of good faith. Hauer v. Union State Bank of Wautoma, supra at 603.

Wisconsin common law reads the duty of good faith into every contract. Estate of Chayka, 47 Wis.2d 102, 108, 176 N.W.2d 561, 564 (1970); Hauer v. Union State Bank of Wautoma, supra at 598. See also Crown Life Ins. Co. v. LaBonte, 111 Wis.2d 26, 44, 330 N.W.2d 201 (1983); Metropolitan Ventures v. GEA Assoc., 2006 WI 71, 291 Wis.2d 393, 717 N.W.2d 58.

In Metropolitan Ventures, supra, ¶ 36, the court said "the duty of good faith arises because parties to a contract, once executed, have entered into a cooperative relationship and have abandoned the wariness that accompanied their contract negotiations, adopting some measure of trust of the other party."

Type of Conduct. Courts have found different types of conduct to constitute a breach of the duty of good faith. In some cases, the breaching conduct has been found actionable under other legal theories. In Chayka, supra, at 108-09, otherwise tortious conduct (fraud) was found to be a breach of the duty of good faith. In Market Street Assoc., supra at 595, the 7th Circuit Court of Appeals, applying Wisconsin law,

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described the duty of good faith as ". . .halfway between a fiduciary duty (the duty of utmost good faith) and the duty to refrain from active fraud." Generally, scienter is not an element in a contract action. Failure to perform a contract need not be willful or negligent to constitute a breach. Restatement (Second) of Contracts, § 235, comment a (1979). Wisconsin does not recognize an action for tortious breach of contract. Anderson v. Continental Ins. 85 Wis.2d 675, 271 N.W.2d 368 (1978); Autumn Grove Joint Venture v. Rachlin, 138 Wis.2d 273, 405 N.W.2d 759 (Ct. App. 1987).

A failure to give notice is not necessarily a breach of the duty of good faith. Wis JI-Civil 3044 discussed in Schaller v. Marine Nat'l Bank of Necedah, 131 Wis.2d 389, 402, 388 N.W.2d 645 (Ct. App. 1986).

The conduct need not be a breach of the express terms of the agreement to violate the duty of good faith. Chayka, supra at 107; Foseid, supra at 796; Where a party not at the mercy of the other could have taken steps to avoid the harm but didn't, the duty of good faith is not breached. Schaller, supra at 403; Where a party's conduct is found to be specifically authorized by express terms of a written agreement, there is no breach of good faith. Super Value Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988).

Separate Claim. A claim for breach of the implied duty of good faith may be maintained separately from a claim for breach of contract. Foseid, supra at 794-95.

Uniform Commercial Code. R. Eisenberg, "Good Faith Under the Uniform Commercial Code," 54 Marq. L. Rev. 1 (1971)

Wis. Stat. § 401.201(19) is discussed in Schaller v. Marine Nat'l Bank of Neenah, supra at 402. The UCC definition of good faith may limit the common law duty in cases where the definition applies. Market Street Assoc., supra at 596.

Wis. Stat. § 401.203 is applicable only to performance and enforcement of agreements under the UCC. The duty of good faith under this section does not apply during negotiation and formation of contracts. A breach of the duty of good faith under the UCC can not be brought as a separate claim. Hauer v. Union State Bank of Wautoma, supra at 595-97.

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3045 DEFINITIONS — "BONA FIDE"

The term "bona fide" means: "In or with good faith; honestly; openly and sincerely; without deceit or fraud." "Bona fide" is also defined as "Truly; actually; without simulation or pretense . . . real, actual, genuine, and not feigned."

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Kansas City Star Co. v. ILHR Department, 60 Wis.2d 591, 601, 211 N.W.2d 488 (1973), states:

> The term "bona fide" is not specifically defined in ch. 108, Stats., and therefore it must be "interpreted in accordance with common and approved usage thereof and in accordance with other accepted rules of statutory construction." [Wis. Stat. § 108.02(21)] The term generally "'signifies a thing done really, with a good faith, without fraud or deceit, or collusion . . .' . . . Bona fide means real, actual, genuine . . . ." [Bridgeport Mortgage & Realty Corp. v. Whitlock, 128 Conn. 57,61, 20 Atl.2d 414 (1941).]

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3046 IMPLIED PROMISE OF NO HINDRANCE

If one person enters into a contract with another, there is an implied promise by each that he or she will do nothing to hinder or obstruct performance by the other. [If cooperation is necessary for the performance of the contract, there is an implied promise to give the necessary cooperation.] [Failure to cooperate may constitute a hindrance or obstruction of performance.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

This instruction is identical to the first paragraph of Wis JI-Civil 3060.

Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 203, 124 N.W. 291 (1910).

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3048 TIME AS AN ELEMENT

The importance of time in connection with the performance of a contract depends upon the nature of the contract, the terms of the contract, and the circumstances appearing from the conduct of the parties. Time is not to be regarded as of the essence of the contract unless it is clear that the parties intended to make it so by their conduct or by the terms on which they have agreed.

Time is not to be regarded as of the essence of the contract merely because a definite time for performance is stated in the contract, in the absence of any further provision regarding the effect of nonperformance at the time stated.

If there is no provision in a contract as to the time for performance, the law will imply a reasonable time which means a somewhat more protracted time than directly, forthwith, or as soon as possible.

If you determine that performance at the exact time agreed upon was intended to be of vital importance to the parties, you may find that time was of the essence so that failure of the party to perform on time may constitute a breach of contract.

COMMENT

This instruction and comment were approved by the Committee in 1975. The language of the instruction was revised in 2016.

Zuelke v. Gergo, 258 Wis. 267, 45 N.W.2d 690 (1951); Wauwatosa Realty Co. v. Bishop, 6 Wis.2d 230, 94 N.W.2d 562 (1959).

Appleton State Bank v.Lee, 33 Wis.2d 690, 693, 148 N.W.2d 1 (1967); Rottman v. Endejan, 6 Wis.2d 221, 226, 94 N.W.2d 596 (1959).

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Rottman v. Endejan, supra at 225; Restatement, Contracts § 276(a).

Reasonable time implied: Delap v. Institute of America, Inc., 31 Wis.2d 507, 512, 143 N.W.2d 476 (1966); 17 Am. Jur. 2d Contracts § 329.

This instruction does not apply to cases under the Commercial Code involving the sale of goods. See Wis. Stat. § 402.601 and following sections.

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3049 DURATION

[A contract which specifies the period of its duration, terminates at the end of the period.]

[A contract which provides that it is to continue for an indefinite period continues for a reasonable time under the circumstances.]

[A contract which does not contain a termination date may be terminated at any time by either party upon reasonable notification to the other party.]

[A contract which provides that the contract is to continue for an indefinite period, but contains a limitation on whether the contract can be terminated, terminates on the happening of the event specified in the limitation.]

[A contract which does not contain a termination date, but which contains a limitation on whether the contract can be terminated, terminates on the happening of the event specified in the limitation.]

COMMENT

This instruction and comment were approved by the Committee in 1975 and revised in 2016.

Irish v. Dean, 39 Wis. 562 (1876); California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 20 Wis.2d 110, 124-25, 121 N.W.2d 308 (1963); Klug v. Flambeau Plastics Corp., 62 Wis.2d 141, 214 N.W.2d 281 (1974).

The fourth and fifth paragraphs are based on the decision in Klug v. Flambeau Plastics Corp., 62 Wis.2d 141, 214 N.W.2d 281 (1974). An example of an event that may trigger termination is "good cause."

The Wisconsin Supreme Court held in MS Real Estate Holdings, LLC v. Fox Family Trust, 2015 WI 49, 362 Wis.2d 258, 864 N.W.2d 83, that:

> . . . Wisconsin courts do not favor perpetual contracts. We are "reluctant to interpret a contract as providing for a perpetual contractual right unless the intention of the contracting parties to provide for the same is clearly stated." Capital Investments, Inc. v. Whitehall Packing Co., Inc., 91 Wis.2d 178, 193, 280 N.W.2d 254 (1979). When the time that a

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contract is to endure is indefinite, this court will imply a reasonable time for the duration of the contract. Farley v. Salow, 67 Wis.2d 393, 402, 227 N.W.2d 76 (1975). However, we do not require parties to express duration in temporal terms in order to avoid indefiniteness. Rather, parties are free to identify triggering events that give rise to termination of the contract in one form or another. Schneider v. Schneider, 132 Wis.2d 171, 389 N.W.2d 835 (1986).

Duration of Right of First Refusal Contracts. See MS Real Estate Holdings, LLC v. Fox Family Trust, supra. In that decision, the court said "a specified triggering event, though uncertain to occur, may render a right of first refusal contract sufficiently definite and establish the duration of the right."

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3050 CONTRACTS: SUBSEQUENT CONSTRUCTION BY PARTIES

Whether the parties to a contract gave it a particular construction is to be regarded by you in giving effect to the provisions of the contract. The subsequent acts of the parties, showing the construction that they themselves have put upon the agreement, are to be considered by you for the purpose of assisting you in arriving at a determination of what the arrangement was between the parties.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Nelsen v. Farmers Mut. Auto Ins. Co., 4 Wis.2d 36, 90 N.W.2d 123 (1958).

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3051 CONTRACTS: AMBIGUOUS LANGUAGE

The parties dispute the meaning of the following language in their contract: (*insert language found by the court to be ambiguous*).[1]

It is your duty to interpret the contract to give effect to what the parties intended when they made their agreement.[2] In determining the meaning of the language, you should consider [include such of the following as are supported by the evidence]:

-- the words in dispute,[3]

-- the purpose of the contract,[4]

-- the circumstances surrounding the making of the contract,[5]

-- the subsequent conduct of the parties [6]

-- other language in the contract [7]

-- [list any other specific factors relating to the case][8]

If you are unable to decide the intention of the parties after considering these factors, then you should interpret the disputed language against the party who prepared the contract.[9]

NOTES

1. This instruction concerns contracts that are enforceable, but contain one or more ambiguous provisions. (JI-3022 addresses contracts alleged to be so vague and indefinite as to be unenforceable.) It may be given to the jury, but only after the court has concluded that language in the contract is ambiguous. "Whether ambiguity exists in a contract is a question of law." Brown v. Maxey, 124 Wis. 2d 426, 442 (1985). "The existence of ambiguity is an issue of law to be decided by the court, not an issue of fact to be decided by the jury." S. A. Healy v. Milwaukee Metropolitan Sewerage District, 50 F. 3d 476, 480 (7th Cir. 1995). Once the court determines that a provision is ambiguous, interpretation of that provision then becomes a question of fact for the jury. Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis.2d 158, 177 (1996).

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2. "The primary goal in contract interpretation is to give effect to the parties' intentions." Seitzinger v. Community Health Network, 270 Wis. 2d 1, 22 (2004).

3. "We ascertain the parties' intentions by looking to the language of the contract itself." *Id.*

4. "Ambiguities in an agreement must be construed in a manner consonant with its dominant purpose and conducive to the accomplishment of that purpose." Capital Investments, Inc. v. Whitehall Packing Co. Inc. 91 Wis. 2d 178, 191 (1979) quoting from Huck v. Chicago St. Paul M & O Ry. Co., 5 Wis.2d 124, 128 (1958).

5. "Where the acts of the parties are inconsistent indicating different constructions, the court will look to the purpose of the contract and the circumstances surrounding its execution to determine the intent." Jones v. Jenkins, 88 Wis. 2d 712, 723 (1979).

6. "It is a well-settled principle of Wisconsin law that, where contract terms may be taken in two senses, evidence of practical construction by the parties is highly probative of the intended meaning of those terms and the court will normally adopt that interpretation of the contract which the parties themselves have adopted." Zweck v. D. P. Way Corp., 70 Wis.2d 426, 435 (1975).

7. "The contract must be read as a whole and every part will be read with reference to the whole." "The general rule as to the construction of contracts is that the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole." Seitzinger, supra at 37 (Abrahamson, dissenting) (other citations omitted).

8. "In resolving the ambiguity and determining the parties' intent, the court may look beyond the face of the contract and consider extrinsic evidence. Additionally, the court may rely on the canons of construction which are designed to ascertain the intentions of the parties entering into a contract." Capital Investments, Inc., supra, at 190. In individual cases, there may be other factors relating to contract interpretation which are appropriate, *e.g.* custom in the trade, etc.

9. Wisconsin courts have consistently restated the well-established rule that in cases of contract ambiguity, the contract is to be construed against the party that drafted it. See, *e.g.* Seitzinger, supra, at 22. A closely related question that has not been specifically addressed in any reported Wisconsin appellate decision is: At what point in its analysis does the finder of fact apply this rule? Many other courts have held that an ambiguous contract is only construed against the drafter if its meaning is not established by other extrinsic evidence. See, *e.g.* Affiliated F. M. Ins. Co. v. Constitution Reinsurance Corp., 626 N.E. 2d 678 (Mass. 1994).

The Committee believes if presented with the issue, Wisconsin appellate courts would not invoke the rule that a contract is construed against the drafter unless the ambiguity cannot be resolved by other evidence. First, as the supreme court has stated the rule, construing the contract against the drafter comes after the consideration of extrinsic evidence. "If the language within the contract is ambiguous, two further rules are applicable: (1) evidence extrinsic to the contract itself may be used to determine the parties' intent and (2) ambiguous contracts are interpreted against the drafter." Seitzinger, supra, at 14. Second, Restatement (Second) of Contracts 2d §206 appears to follow the rule that the contract is only construed against the drafter if other evidence is inconclusive. The Comment to §206 states that "In cases of doubt, therefore, *so*

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long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party." (emphasis added). Third, although the Wisconsin Supreme Court has not directly addressed the question, the issue is discussed in a concurrence. In Roth v. City of Glendale, 237 Wis. 2d 173 (2000) Justice Sykes wrote as follows:

> "A 'default rule,' properly understood, is a judicial canon of contract construction (such as the rule that we construe contracts against the drafter) that applies only in the event of an unresolvable ambiguity-a tie-and only at the end of the process after extrinsic evidence has failed to clear up the question." Roth v. City of Glendale, 237 Wis. 2d 173 (2000) (J. Sykes, concurring).

The Committee concludes the jury should be instructed to construe the contract against the drafter only if the ambiguity cannot be resolved following consideration of other extrinsic evidence.

COMMENT

The instruction and comment were approved in 2011.

The last sentence in the instruction may have to be modified if there is a dispute concerning which party prepared either the entire contract or the specific language found by the court to be ambiguous. There may be other situations in which the sentence should be eliminated entirely, such as where the contract is a result of negotiations between the parties and the evidence would not sustain a finding that either party alone prepared the contract or the ambiguous language.

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3052 SUBSTANTIAL PERFORMANCE

Each party to a contract has a duty to perform his or her obligations under the contract.

Evidence has been received that (defendant) may not have completely performed his or her obligations. A failure to complete performance under a contract, or a defective performance, does not prevent recovery if you find that there was substantial performance of the contract. You must first find that there was a good faith effort to perform; if you find that a good faith effort was made, you will then proceed to determine whether the performance was, in a legal sense, substantial.

Performance may be substantial even though every detail is not in strict compliance with the terms of the contract; something less than perfection is required. Some measure of nonperformance will be tolerated if (defendant) has received, with relatively minor and unimportant deviations, what he or she bargained for. But if the defect or uncompleted performance is of such extent and nature that there has been no practical fulfillment of the terms of the contract, then there has been no substantial performance.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction. An editorial correction was made in 1994.

Substantial performance: theory of recovery; what is substantial performance: Kreyer v. Driscoll, 39 Wis.2d 540, 159 N.W.2d 680 (1968); Plante v. Jacobs, 10 Wis.2d 567, 103 N.W.2d 296 (1960); 17 Am. Jur. 2d Contracts §§ 631, 632, 633, and 634; Corbin on Contracts §§ 700-705; 5 Williston on Contracts § 805, et seq.

Good faith effort: Nees v. Weaver, 222 Wis. 492, 269 N.W. 266 (1936). See Wis JI-Civil 3044 - Good Faith.

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As to sale: contracts, see Wis. Stat. § 402.601, as modified by Wis. Stat. §§ 402.612, 402.508, 402.608, 402.614(1), 402.504(2), 401.203.

Notwithstanding the inability of the plaintiff to show substantial performance, plaintiff may be entitled to compensation under a quantum meruit theory. Kreyer, supra.

A finding that plaintiff substantially performed does not insulate plaintiff from a claim for damages for the unfulfilled or defectively performed obligations under the contract. DeSombre v. Bickel, 18 Wis.2d 390, 118 N.W.2d 868 (1963); Corbin on Contracts § 702.

There are other situations in which the substantiality of the performance of one party to a contract may have important legal consequences. Corbin on Contracts § 700.

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3053 BREACH OF CONTRACT

A party to a contract breaches it when performance of a duty under the contract is due and the party fails to perform. Failing to perform a duty under the contract includes defectively performing as well as not performing at all.

COMMENT

This instruction and comment were approved in 2006.

Restatement of Contracts (Second) sec. 235; Steele v. Pacesetter Motor Cars, Inc., 2003 WI App 242, 267 Wis.2d 873.

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3054 DEMAND FOR PERFORMANCE

Before an action may be maintained for breach of a contract, a demand for performance in accordance with the contract must be made. [However, a demand is unnecessary if the party alleged to have breached the contract (denies the existence of the contract) (declares an intention not to perform).]

A request for performance which differs materially from the terms of the contract is not a sufficient demand.

It is for the jury to determine whether a demand for performance in accordance with the terms of the contract was made.

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was updated in 2011. A citation was corrected in 2014.

Corbitt v. Stonemetz, 15 Wis. 170 (1862); Scherg v. Puetz, 269 Wis. 561, 69 N.W.2d 490 (1955).

If the contract requires payment of a certain sum at specified intervals, no demand is necessary. Gall v. Gall, 120 Wis. 270, 97 N.W. 938 (1904).

Uniform Commercial Code Cases. The Uniform Commercial Code requires a notice of breach when a buyer has accepted delivery of goods and then discovers a nonconformity. Wis. Stat. § 402.607(3). When a seller under the U.C.C. fails to make a delivery or repudiates the contract, there is no requirement to provide notice of breach. Wis. Stat. § 402.711.

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3056 SALE OF GOODS: DELIVERY OR TENDER OF PERFORMANCE

A seller of goods or merchandise has the obligation to transfer and deliver the goods or merchandise; the obligation of the buyer is to accept and pay for the goods or merchandise in accordance with the contract.

The seller must put and hold goods or merchandise which conform to the terms of the contract at the buyer's disposition, and give the buyer any notification reasonably necessary to enable the buyer to take delivery.

Upon delivery, the buyer must stand ready to pay according to the terms of the contract. If the contract does not specify otherwise, payment may be by any means or manner currently used in the ordinary course of business, unless the seller demands payment in legal tender and provides an extension of time reasonably required by the buyer to procure payment.

The manner, time, and place of transfer and delivery are determined by the agreement of the parties, but must be at a reasonable hour. The goods or merchandise must be kept available for a period reasonably necessary to enable the buyer to take possession.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Obligation: Shy v. Industrial Salvage Material Co., 264 Wis. 118, 58 N.W.2d 452 (1953); Wis. Stat. §§ 402.301, 402.511.

Payment: Alpirn v. Williams Steel & Supply Co., 199 F.2d 734 (7th Cir. 1952); Wis. Stat. §§ 402.511, 402.503.

Kept available: Wis. Stat. § 402.503.

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3057 WAIVER

Waiver means that a person is precluded from asserting a right, a claim or privilege because he or she has previously knowingly, voluntarily, and intentionally relinquished or given up that right, claim, or privilege.

Waiver must be a voluntary act and implies a knowing choice by a person to dispense with something of value or to forego a right or advantage which the person might have demanded and insisted upon. It only involves the conduct of the party against whom the waiver is asserted and consideration is not necessary for the doctrine to apply; nor need there be a detriment or harm to the party claiming the waiver.

The following elements must appear before the doctrine of waiver can apply:

1. That the person had a right, claim, or privilege in existence at the time of the claimed waiver.

2. That the person who is alleged to have waived such a right had knowledge, actual or constructive, of the existence of his or her rights or of the important or material facts which were the basis of his or her right.

3. That the person waiving such right did so intentionally and voluntarily.

Constructive knowledge is knowledge which one has the opportunity to acquire by the exercise of ordinary care and diligence. If a person is ignorant of a material or important fact, that is, if he or she lacks actual or constructive knowledge, a waiver is not possible.

The intent to waive can be inferred from the conduct of the party against whom the waiver is claimed. However, the conduct or act out of which the waiver is sought to be

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established must have been done intentionally and with present knowledge of the rights involved, or of the material or important facts which are the basis of those rights.

Unreasonable delay in taking or not taking action may be taken into account in considering whether there has been conduct amounting to a waiver.

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was updated in 2018.

The doctrines of estoppel and waiver are related, but separate, doctrines. Knapke v. Grain Dealers Mut. Ins. Co., 54 Wis.2d 525, 532, 196 N.W.2d 737 (1972); 28 Am. Jur. 2d Estoppel and Waiver § 30; Perlick v. Country Mut. Cas. Co., 274 Wis. 558, 80 N.W.2d 921 (1957).

Waiver is the voluntary and intentional relinquishment of a known right. Bank of Sun Prairie v. Opstein, 86 Wis.2d 669, 681, 237 N.W.2d 279 (1979).

Ryder v. State Farm Mutual Auto Ins. Co., 51 Wis.2d 318, 326, 187 N.W.2d 176 (1971) (Failure of insurer to rescind because of misrepresentation is not estoppel because no reliance by insured; and not waiver because hearsay knowledge by agent not known to underwriter at time of reissuance of policy); Nolop v. Spettel, 267 Wis. 245, 64 N.W.2d 859 (1954) (Payment under cost-plus contract of wage claims is not waiver because of ignorance that wage rate included overcharges), 28 Am. Jur. 2d Estoppel and Waiver § 154.

Consideration not necessary: Perlick v. Country Mut. Cas. Co., 274 Wis. 558, 80 N.W.2d 921 (1957); Will of Rice: Cowie v. Strohmeyer, 150 Wis. 401, 468, 136 N.W. 956 (1912). See 17 Am. Jur. 2d Contracts § 391.

Knowledge: Attoe v. State Farm Mut. Auto Ins. Co., 36 Wis.2d 539, 545-56, 153 N.W.2d 575 (1967) (Insurer's answer without raising plea in abatement waived non-action defense); Nolop v. Spettel, 267 Wis. 245, 64 N.W.2d 859 (1954); Joplin v. John Hancock Mut. Life Ins. Co., 55 Wis.2d 650, 655, 200 N.W.2d 607 (1972).

Voluntary: 28 Am. Jur. 2d Estoppel and Waiver §§ 157, 158; Broadbent v. Hegge, 44 Wis.2d 719, 726, 172 N.W.2d 34 (1969); Bade v. Badger Mut. Ins. Co., 31 Wis.2d 38, 142 N.W.2d 218 (1966); Hanz Trucking, Inc. v. Harris Bros. Co., 29 Wis.2d 254, 138 N.W.2d 238 (1965).

Delay: Somers v. Germania National Bank, 152 Wis.210, 220, 138 N.W. 713 (1913). See also Thompson v. Village of Hales Corners, 115 Wis.2d 289, 319, 340 N.W.2d 704 (1983).

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3058 WAIVER OF STRICT PERFORMANCE

A party to a contract may waive strict and full performance of any provisions made for his or her benefit. To be effective, however, a waiver must be the voluntary and intentional relinquishment of a known right. Contract provisions may be waived expressly or the waiver may be inferred from the conduct of the parties.

If performance under a contract is defective but a party consents to such performance with knowledge of the circumstances and, after full opportunity for examination, that party fails to give timely notice of the defect to the performing party, any requirement of strict performance is deemed to be waived.

[A partial or total payment on a contract does not constitute an acceptance of less than full performance insofar as hidden defects are concerned. Payment by a party with knowledge of a particular defect is a waiver of strict performance in the absence of any other circumstances tending to show a waiver was not intended.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Waiver: Godfrey Co. v. Crawford, 23 Wis.2d 44,49, 126 N.W.2d 495 (1964); Lukens Iron & Steel Co. v. Hartmann-Greiling Co., 169 Wis. 350, 355, 172 N.W. 894 (1919); 17 Am. Jur. 2d Contracts § 390.

Failure of notice: Wis. Stat. § 402.606; The J. Thompson Mfg. Co. v. Gunderson, 106 Wis. 449, 453, 82 N.W. 299 (1900); Fun-N-Fish, Inc. v. Parker, 10 Wis.2d 385, 103 N.W.2d 1 (1960).

Payment with knowledge: Milaeger Well Drilling Co. v. Muskego Rendering Co., 1 Wis.2d 573, 580, 85 N.W.2d 331 (1957).

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3060 HINDRANCE OR INTERFERENCE WITH PERFORMANCE

If one person enters into a contract with another, there is an implied promise by each that each person will do nothing to hinder or obstruct performance by the other. [If cooperation is necessary for the performance of the contract, there is an implied promise to give the necessary cooperation.] [Failure to cooperate may constitute a hindrance or obstruction of performance.]

The implied promise is as binding as if spelled out [and failure to fulfill the promise constitutes a breach of contract]. The doing of acts or the failure to do acts which one party knows or ought to know would hinder or prevent the other from performing his or her obligations under the contract may constitute such a breach.

(But if hindrance or obstruction of the performance of a party [is reasonably necessary or] was contemplated at the time the contract was made, it would not be considered a breach.)

(The conduct of a party which may have been sufficient to hinder or prevent performance by the other party to a contract does not constitute a breach if the other party would not have performed in any event.)

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Implied promise: Gessler v. Erwin Co., 182 Wis. 315, 193 N.W. 363 (1924); Edward E. Gillen Co. v. John H. Parker Co., 170 Wis. 264, 171 N.W. 61 (1919); Kehm Corp. v. United States, 93 F. Supp. 620 (1950).

Breach: Edward E. Gillen Co., supra.

Corbin on Contracts, Vol. 4, § 947; 17 Am. Jur. 2d Contracts § 442.

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Hindrance contemplated: Corbin on Contracts, Vol. 3, § 571, Vol. 4, § 947.

No breach by hindrance if other party would not have performed: Corbin on Contracts, Vol. 3, § 571, n. 6.

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3061 IMPOSSIBILITY: ORIGINAL

If performance of a promise is impossible because of a state of facts existing when the contract was made and the promisor had no knowledge or reason to know of such facts, there is no duty to perform.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 456; Estate of Zellmer, 1 Wis.2d 46, 49, 82 N.W.2d 891 (1957).

Impossibility of performance may excuse a condition, even a condition precedent, if the existence or occurrence of the condition is not a material part of the exchange for the promisor's performance, and enforcement of the condition would operate as a forfeiture. Restatement, Contracts § 301. In an action on a life and disability policy, a condition precedent requiring notice or proof of disability was excused where its performance was impossible by reason of the physical and mental incapacity of the insured during the period when proof should have been furnished. Schlintz v. Equitable Life Assurance Soc'y, 226 Wis. 255, 276 N.W. 336 (1937); Kraus v. Wisconsin Life Ins. Co., 27 Wis.2d 611, 135 N.W.2d 329 (1965).

If the contract imposes an absolute duty regardless of the existing situation, then, as a matter of law, impossibility would not be a defense.

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3062 IMPOSSIBILITY: SUPERVENING

If performance of a contract is possible only if a certain state of facts continues to exist, then a cessation or termination of the state of facts which makes performance impossible will excuse failure to perform. But if performance becomes impossible by reason of contingencies which should have been foreseen by a party, then such party is not excused from the duty to perform.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Cook v. McCabe, 53 Wis. 250, 259, 10 N.W. 507 (1881); Jennings v. Lyons, 39 Wis. 553 (1876).

Financial inability of a party to perform does not amount to impossibility in a legal sense. Green v. Kaemph, 192 Wis. 635, 640, 212 N.W. 405 (1927).

See Comment to Wis JI-Civil 3061.

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3063 IMPOSSIBILITY: PARTIAL

If a party cannot do part of what the party has promised to do because of circumstances beyond his or her control and not within his or her ability to foresee, but the rest of the performance can be made without material difficulty or disadvantage, then the duty of the promisor to perform may be excused only to the extent of the partial impossibility.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Hess Bros., Inc. v. Great Northern Pail Co., 175 Wis. 465, 185 N.W. 542 (1921); Appleton Elec. Co. v. Rogers, 200 Wis. 331, 228 N.W. 505 (1930); Restatement, Contracts § 463.

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3064 IMPOSSIBILITY: TEMPORARY

If performance is temporarily made impossible without fault of a party, his or her duty to perform is excused during the period of the impossibility. The contract is not terminated unless the impossibility of performance continues for such a long period of time that the object of the contract is defeated.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 462; Hess Bros., Inc. v. Great Northern Pail Co., 175 Wis. 465, 185 N.W. 542 (1921).

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3065 IMPOSSIBILITY: SUPERIOR AUTHORITY

If performance of a promise is prevented by the act of a superior authority such as legislative enactment or a judicial, executive, or administrative order duly made, the duty to perform the promise is discharged.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Restatement, Contracts § 458; Hess Brothers v. Great Northern Pail Co., 175 Wis. 465, 185 N.W. 542 (1921).

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3066 IMPOSSIBILITY: ACT OF GOD

If the intervention of unforeseen and uncontrollable superior agencies such as storms or drought render performance impossible, the duty to perform the promise is discharged.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

1 Am. Jur. 2d Act of God § 12; 17 Am. Jur. 2d Contracts §§ 404, 410; Jennings v. Lyons, 39 Wis. 553 (1876); Gill v. Benjamin, 64 Wis. 362, 25 N.W. 445 (1885).

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3067 IMPOSSIBILITY: DISABILITY OR DEATH OF A PARTY

If the promise to be performed is one which the promisor alone is competent to do, the duty of the promisor is discharged if he or she is prevented by mental or physical disability or death from performing.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Jennings v. Lyons, 39 Wis. 553 (1876); Rowe v. Compensation Research Bureau, Inc., 265 Wis. 589, 595, 62 N.W.2d 581 (1954).

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3068 VOIDABLE CONTRACTS: DURESS, FRAUD, MISREPRESENTATION

There must be full and free consent by the parties to the terms of a contract. If consent of a party is gained through duress, fraud, or misrepresentation, that party may either avoid or ratify the contract.

[Follow with instructions Wis JI-Civil 2400 et seq. on misrepresentation.]

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was updated in 2016.

Corbin on Contracts § 6, 17 Am. Jur. 2d Contracts §§ 151, 153, 154.

Seidling v. Unichem, Inc., 52 Wis.2d 552, 191 N.W.2d 205 (1971); Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201 (1969); Mendelson v. Blatz Brewing Co., 9 Wis.2d 487, 101 N.W.2d 805 (1960).

Rescission. A misrepresentation of fact must be material before it can render a contract void or voidable. Bank of Sun Prairie v. Esser, 155 Wis.2d 724, 456 N.W.2d 585 (1990); Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451.

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3070 FRUSTRATION OF PURPOSE

Frustration of purpose is a defense to enforcement of a contract. To excuse a party claiming this defense of their obligation under the contract, that party must prove:

1. Their principal purpose(s) in making the contract was (were) frustrated; (The purpose that is frustrated must have been a principle purpose of the party claiming the defense in making that contract. It is not enough that they had in mind some specific object without which they would not have made the contract. The object must be so completely the basis of the contract that as both parties understood, without it the transaction would have made little sense.)
2. The frustration of purpose was not their fault;
3. The purpose(s) was (were) frustrated by an event, the non-occurrence of which was a basic assumption under the contract. (The frustrating event must strike at the foundation of the contract where the basic assumption on which the contract was made was such that the party's performance was virtually worthless or meaningless due to the unexpected occurrence.)

COMMENT

This instruction was approved by the Committee in 1975, and the comment was revised in 2011. This revision was approved by the Committee in January 2020; it revised the elements of the doctrine of frustration, as well as added to the comment.

It is a "well-settled rule" in Wisconsin that death alone does not discharge contractual obligations. In re Estate of Sheppard, 2010 WI App 105, 328 Wis.2d 533, 789 N.W.2d 616; Volk v. Stowell, 98 Wis. 385, 390, 74 N.W.118 (1898). One of the many exceptions to this rule include personal service contracts. In re Estate of Sheppard, supra.

See also Restatement (Second) of Contracts § 265.

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The doctrine of frustration of purpose, referred to generally as "frustration" or as "discharge by supervening frustration" by Restatement (Second) of Contracts § 265, is as follows:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. Section 265.

In 1974, the Wisconsin Supreme Court adopted a tentative draft of Section 265 into the common law. Wm. Beaudoin & Sons, Inc. v. Milwaukee County, 63 Wis.2d 441, 217 N.W.2d 373 (1974).

Frustration of purpose requires that "(1) the party's principal purposes in making the contract is frustrated; (2) without that party's fault; (3) by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made." Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Chicago & N.W. Transp. Co., 82 Wis.2d 514, 523-24, 263 N.W.2d 189 (1978). This doctrine addresses situations in which "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." Restatement (Second) of Contracts § 265 cmt. a. If these elements are met, a party's duties under an agreement are discharged. Ryan v. Estate of Sheppard, supra.

The doctrine of frustration is "given a narrow construction" and "applied sparingly." Convenience Store Leasing and Management v. Annapurna Marketing, 388 Wis.2d 353, 933 N.W.2d 110, 2019 WI App 40, citing 17A Am. Jur. 2d Contracts § 641 (2016). This is so because it renders null the explicit terms of the contract and is counter to the strong impulse in the law to enforce contracts as written. Id. The party asserting the defense has the burden to prove frustration of purpose. Id. §§ 632, 640.

Principal Purpose: As the restatement explains: "[T]he purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he [or she] had in mind some specific object without which he [or she] would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a. For example, in Convenience Store Leasing and Management v. Annapurna Marketing, 388 Wis.2d 353, 933 N.W.2d 110, 2019 WI App 40, AP Marketing executed a fuel supply agreement (FSA) with Bulk Petroleum Corporation. Under this agreement, AP Marketing agreed to submit to certain branding requirements that might be imposed by the "branded" fuel supplier chosen by Bulk Petroleum. After the branded supplier was chosen, AP failed to comply with the agreement, citing the cost that it would incur if forced to meet the suppliers branding requirements of indoor restrooms. In deciding this matter, the second district court of appeals held that the principal purpose of the FSA was to supply fuel to AP's gas station. The prospect of reduced profitability or financial losses incurred by AP in complying with the branding requirements did not constitute a substantial frustration of the FSA's principal purpose. Id. at ¶22. As the court noted in its decision reversing the district court, "While the modification may have been more expensive than AP hoped, costs that are unwanted or higher than expected are not the same as ones that are unforeseeable, the non-occurrence of which underlie the making of the deal." Id. at ¶23.

Excuse of performance: Frustration of purpose only excuses performance where the frustration is "so severe that it is not fairly to be regarded as within the risks ... assumed under the contract."

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Convenience Store Leasing and Management v. Annapurna Marketing, 388 Wis.2d 353, 363, 933 N.W.2d 110, 2019 WI App 40 citing RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a. The frustrating event must strike at the foundation of the contract – a basic assumption on which the contract was made such that the party's performance, due to this unexpected circumstance, would be "virtually worthless" and "meaningless." Convenience Store Leasing and Management v. Annapurna Marketing, 388 Wis.2d 353, 933 N.W.2d 110, 2019 WI App 40 citing 17A Am. Jur. 2d Contracts § 641 (2016).

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3072 AVOIDANCE FOR MUTUAL MISTAKE OF FACT

You are instructed that a mutual mistake of fact exists where both parties to a contract are unaware of the existence of a past or present fact material to their agreement, or where both parties believe a fact exists which is actually non-existent. The unawareness or belief, however, must arise from a lack of knowledge of the possibility that the fact may or may not exist. If the parties are conscious or aware of, or alerted to, the possibility that a fact does or does not exist, and they waive any inquiry or make no investigation with respect to it, they are not legally mistaken with respect to it.

If there was conscious doubt or uncertainty on the part of the parties as to the existence or non-existence of a fact or situation, and the parties reached an agreement under such circumstances, it is considered that it was their intention and contemplation to accept and compromise the consequences of the doubt and uncertainty, and they would not then be acting under mutual mistake of fact.

A mistake to be mutual must involve both parties. A mere mistake on the part of one, in the absence of fraud on the part of the other, will not avoid a contract obligation.

[A mutual mistake of fact exists when both parties believe and rely on medical representation as to the nature and extent of injuries, which later prove to be erroneous, even though such representations were made in good faith. The representations, however, must refer and apply to existing facts and not be mere expressions of opinion as to future events or development.]

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COMMENT

This instruction and comment were approved by the Committee in 1975 and revised in 2014.

Mistake of fact: Grand Trunk Western R.R. v. Lahiff, 218 Wis. 457, 261 N.W. 11 (1935); Meeme Mut. Home Protective Fire Ins. Co. v. Lorfeld, 194 Wis. 322, 216 N.W. 507 (1927); Kowalke v. Milwaukee Elec. Ry. & Light Co., 103 Wis. 472, 79 N.W. 762 (1899). See also Ivancevic v. Reagan, 2013 WI App 121, 351 Wis.2d 138, 839 N.W.2d 416.

Reliance on medical representations: Bryan v. Noble, 5 Wis.2d 48, 92 N.W.2d 226 (1958); Schmidtke v. Great Atlantic & Pacific Tea Co. of America, 236 Wis. 283, 294 N.W. 828 (1940), and Granger v. Chicago M. & St. P. Ry., 194 Wis. 51, 215 N.W. 576 (1927).

Misrepresentations of material facts made by physician employed by the releasee, even though innocently made, constitute constructive fraud sufficient to sustain a setting aside of a release where relied on in good faith by the releasor in executing the release. The fact that such a mistake may be unilateral and not mutual is not material, because the basis for setting aside the release is the misrepresentation, not the mistake of fact. Doyle v. Teasdale, 263 Wis. 328, 343, 57 N.W.2d 381 (1953).

Inadequate consideration is given considerable significance if supported by other evidence, in establishing fraud, mistake, etc. Jandrt v. Milwaukee Auto Ins. Co., 244 Wis. 618, 626, 39 N.W.2d 698 (1949); Doyle v. Teasdale, supra at 345.

Even though the release expressly covers unknown injuries, whether the parties intended the release to cover unknown injuries is usually a question of fact. Doyle v. Teasdale, supra at 346.

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3074 ESTOPPEL: LAW NOTE FOR TRIAL JUDGES

The Committee withdrew the instruction Wis JI-Civil 3074, ESTOPPEL, and replaced it with this law note. The withdrawal is based on the Committee's determination that either of the two doctrines of estoppel recognized in Wisconsin can be best applied by the court on the basis of special fact inquiries to the jury without the necessity of specific instructions bearing on all of the elements of estoppel. Instructing on the ultimate issue of estoppel is tantamount to telling the jury what the result of the lawsuit will be. The Committee believes instructions on estoppel should be tailored to the specific facts of each individual case. Whether an estoppel results from established facts is a question for determination by the court.

There may be many situations where only one element is in dispute, such as whether a representation was made or whether a promise was made or whether there was reliance. So long as the instructions are otherwise proper and sufficient, it is immaterial that the plea of estoppel as such is not submitted under the designation of estoppel for consideration by the jury.

EQUITABLE ESTOPPEL - ESTOPPEL IN PAIS

The doctrine of equitable estoppel in pais has long been recognized in Wisconsin. An estoppel arises where a person is prevented from asserting or denying a fact because of prior conduct by which a contrary position has been admitted or implied. Such conduct may consist of action or nonaction and includes representations or silence where there is a duty to speak or respond. To apply, it is necessary that the action or nonaction of one induce another to rely thereon, to his or her detriment. The burden of proof, the middle civil burden, is upon the person asserting the estoppel.

PROMISSORY ESTOPPEL

The doctrine of promissory estoppel was first recognized in Wisconsin in Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1964). It is distinguished from equitable estoppel by the fact that it arises from an express or implied promise rather than out of action or nonaction by the other party. Promissory estoppel arises where there is a promise, express or implied, even though made without valuable exchange, if it was intended to be relied upon and if it was in fact relied upon by the other party. In addition to a promise,

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express or implied, it is necessary that the promisor should reasonably expect reliance by another which, in fact, does induce action or forbearance by the other. The burden of proof in cases of promissory estoppel is the same as in equitable estoppel.

Traditionally, the word "estoppel" is used to describe a doctrine upon which a party to a lawsuit may defend and prevent a recovery, but the doctrine of promissory estoppel provides a ground for a cause for action upon which a recovery may be made. Thus, the doctrine of promissory estoppel offends the traditional concept that estoppel merely serves as a shield and cannot serve as a sword to create a cause of action.

COMMENT

This law note and comment were approved by the Committee in 1985. Case authority was added to the comment in 2006, 2009, 2016, and 2018.

Equitable estoppel or estoppel in pais defined: Bade v. Badger Mut. Ins. Co., 31 Wis.2d 38, 46, 142 N.W.2d 218 (1966); Bratt v. Peterson, 31 Wis.2d 447, 454, 143 N.W.2d 538 (1966); Wendy M. v. Helen E.K., 2010 WI App 90 ¶ 13, 327 Wis.2d 749, 787 N.W.2d 848.

Silence: Dunn v. Pertzsch Const., Inc., 38 Wis.2d 433, 437, 157 N.W.2d 652 (1968). 28 Am.Jur.2d Estoppel and Waiver § 53 (1966); Gabriel v. Gabriel 57 Wis.2d 424, 429, 204 N.W.2d 494 (1973); 28 Am.Jur.2d Estoppel and Waiver §§ 76, 77, 78 (1966).

"Equitable estoppel" and "estoppel in pais" are terms that are interchangeable. 28 Am.Jur.2d Estoppel and Waiver §§ 26, 27, 29 (1966).

Defense of equitable estoppel is not limited to actions brought in equity, and equitable estoppel may apply to preclude assertion of rights and liabilities under a note or contract. Gabriel v. Gabriel, supra.

There is a close relationship between the doctrines of equitable estoppel and part performance. See Bunbury v. Krauss, 41 Wis.2d 522, 164 N.W.2d 473 (1969).

In Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797, the court of appeals concluded that it was not error to apply equitable estoppel to bar a defense based on the statute of limitations for contracts.

Promissory estoppel defined: Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1984); Janke Const. Co., Inc. v. Balcan Materials Co., 527 F.2d 772 (1976); Skebba v. Kasch, 2006 WI App 232, 297 Wis.2d 401, 724 N.W.2d 408. Gruen Industries, Inc. v. Biller, 608 F.2d 274 (1979); Landess v. Borden, Inc., 667 F.2d 628 (1981).

Promissory estoppel as grounds for a cause of action (a sword as distinguished from a shield): Hoffman v. Red Owl Stores Inc., supra at 696.

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Promissory estoppel involves a third requirement: that the remedy can only be invoked where necessary to avoid injustice. This third element involves a policy decision for the court and not for the jury. Hoffman v. Red Owl Stores, Inc., supra.

Implied promise: see Silberman v. Roethe, 64 Wis.2d 131, 218 N.W.2d 723 (1973).

Burden of proof: see Eckstein v. Northwestern Mut. Life Ins. Co., 226 Wis. 60, 275 N.W. 916 (1937).

Facts for the jury - estoppel for the court: see Nesbitt v. Erie Coach Co., 416 Penn. 89, 204 Atl.2d 473 (1964); General Elec. Co. v. N.K. Ovalle, Inc., 335 Penn. 439, 6 Atl.2d 835, 838 (1939). See also Skebba v. Kasch, 2006 WI App 232, 297 Wis.2d 401, 724 N.W.2d 408; Kramer v. Alpine Valley Resort, Inc., 108 Wis.2d 417, 321 N.W.2d 293 (1982).

Instructions proper without designating estoppel: see Darst v. Fort Dodge D.M. & S.R.R., 194 Iowa 1145, 191 N.W. 288 (1922); Miller v. Conn, 193 Iowa 458, 186 N.W. 902 (1922). Wisconsin in accord, Foellmi v. Smith, 15 Wis.2d 274, 112 N.W.2d 712 (1961).

Form of verdict for promissory estoppel: see Hoffman v. Red Owl Stores, Inc., supra.

For the award by the court of reliance damages or expectation damages: see Skebba, supra, and Tynan v. JBVBB, LLC, 2007 WI App 265, 306 Wis.2d 522, 743 N.W.2d 730.

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3076 CONTRACTS: RESCISSION FOR NONPERFORMANCE

Not every breach of a contract or failure exactly to perform entitles the other party to rescind. Rescission is not permitted for a slight, casual, trivial, or technical failure to perform the obligations of the contract.

A contract may be rescinded by a party only if the other party has breached the contract in a substantial manner so serious as to destroy the essential objects or purposes of the contract.

Where a party unjustifiably or persistently refuses to perform a material contract obligation or is so neglectful in the performance of the contract as to indicate an intention not to comply substantially with the contract, the other party to the contract is entitled to regard the attitude of the first party as a repudiation of the contract, and may rescind the contract by indicating this rescission to the first party.

COMMENT

This instruction and comment were approved by the Committee in 1975. An editorial correction was made in 2001.

17 Am. Jur. 2d §§ 503, 504; Restatement, Contracts, § 293; Appleton State Bank v. Lee, 33 Wis.2d 690, 148 N.W.2d 1 (1967); Hoffman v. Danielson, 251 Wis. 34, 27 N.W.2d 739 (1947).

Repudiations as basis for rescissions: Gedanke v. Wisconsin Evaporated Milk Co., 215 Wis. 370, 254 N.W. 660 (1934); Shy v. Industrial Salvage Material Co., 264 Wis. 118, 58 N.W.2d 452 (1953).

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3078 ABANDONMENT: MUTUAL

Obligations under a contract may be terminated if the contract is abandoned by both the parties. The abandonment of a contract is purely a matter of intent to be ascertained from the facts and circumstances existing at the time the abandonment is alleged to have occurred.

In addition to acts by the parties which would show that an abandonment has occurred, it must appear that there was an actual mutual intention to abandon the contract. Intent to abandon may be express or may be inferred from the conduct of the parties.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Gessler v. Erwin Co., 182 Wis. 315, 340, 193 N.W. 363 (1924); 17 Am. Jur. 2d Contracts § 484.

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3082 TERMINATION OF SERVANT'S EMPLOYMENT: INDEFINITE DURATION

If a contract of employment does not specify the duration of the employment but fixes compensation at a certain amount per (week) (month) (year), and if the employee furnishes no consideration in addition to the services incident to the employment, the contract is an indefinite general hiring, terminable at the will of either party. In such circumstances, a discharge without cause does not constitute a breach of the employment contract.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Brown v. Oneida Knitting Mills, Inc., 226 Wis. 662, 277 N.W. 653 (1938); Saylor v. Marshall and Ilsley Bank, 224 Wis. 511, 272 N.W. 369 (1937).

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3083 TERMINATION OF SERVANT'S EMPLOYMENT: EMPLOYER'S DISSATISFACTION

If, by the terms of the employment contract, the employer may discharge the employee if the employer is dissatisfied with the employee, it makes no difference whether the employer's reasons which led to the discharge exist in fact or are merely imaginary, as long as the employer's belief is real and in good faith. That is, the employer's dissatisfaction must not be capricious or mercenary, nor result from a dishonest design to be dissatisfied.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 20 Wis.2d 110, 124, 121 N.W.2d 308 (1963); Lieberman v. Weil, 141 Wis. 635, 124 N.W. 262 (1910).

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3084 TERMINATION OF SERVANT'S EMPLOYMENT: ADDITIONAL CONSIDERATION PROVIDED BY EMPLOYEE

If an employee, in connection with a contract or agreement of employment, furnishes some consideration to his or her employer in addition to his or her normal services, the employee can be discharged only for cause or for justifiable reasons. Consideration is defined as anything of substantial value contributed by the employee to the employer. Cause is defined as action which shows a substantial disregard for the interests of the employer.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Forrer v. Sears, Roebuck & Co., 36 Wis.2d 388, 153 N.W.2d 587 (1967); California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 20 Wis.2d 110, 126, 121 N.W.2d 308 (1963).

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3086 REAL ESTATE LISTING CONTRACT: VALIDITY: PERFORMANCE

A contract, to constitute a valid real estate listing contract, must, in writing, describe the real estate, express the price for which the same may be sold, the commission to be paid, and the period during which the agent or broker shall procure a buyer. The contract must be complete at the time it is signed by the person agreeing to pay the commission.

Before a real estate broker is entitled to any commission under a real estate listing contract, the broker must procure a purchaser who is ready, willing, and able to meet the express terms of the listing contract. (A seller has the right to reject an offer that does not conform to the terms specified in the listing contract. When a seller refuses to accept an offer which is substantially in accordance with the listing contract, but which contains variances from the terms of the listing contract, the seller to relieve himself or herself from liability for the broker's commission must, when rejecting the offer, point out the variances to the broker so that the broker may be afforded an opportunity to obtain an offer that does comply. However, where the variance is a substantial one, such as one that is directly in conflict with a material provision in the listing contract, then there has been no substantial performance by the broker which would entitle the broker to the commission and the owner is under no obligation to specify the reasons for rejection.)

To "procure a purchaser" means to obtain an unequivocal written offer, which in this case means an offer to pay $_____ at the time the seller specifies.

A purchaser must be ready, willing, and able to pay $_____. All three elements must exist before it can be said that the broker has procured a purchaser. The purchaser must not only be ready and willing, but must be able to pay $_____. The purchaser

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need not have the required cash in hand, but must be able to command the necessary funds at the required time.

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was revised in 2019.

Substantial Variance. Sellers can reject an offer to purchase without giving a reason and without triggering a broker's entitlement to a commission if there are "substantial" variances between the terms of the listing contract and the terms of the offer. Kleven v. Cities Serv. Oil Co., 22 Wis. 2d 437, 126 N.W.2d 64 (1964). Subsequent to the Kleven decision, the court held in Libowitz v. Lake Nursing Home, Inc., 35 Wis. 2d 74, 150 N.W.2d 439 (1967) that offer terms may constitute a "substantial variance" only if they directly conflict with express terms specified in the listing contract. No conflict or tension was observed between Kleven and Libowitz when the court examined both in Peter M. Chalik & Associates v. Hermes, 56 Wis.2d 151, 201 N.W.2d 514 (1972) and the implicit conclusion was that they present the same standard. Kleven thus remains the law with regard to determining whether a substantial variance exists between the listing contract and the offer to purchase. Although a term of the offer to purchase that is directly in conflict with the listing contract is a substantial variance, it is not the sole manner in which substantial variance may be shown. Kleven offered direct contradiction as an example, not as a limitation. McNally v. Capital Cartage, Inc., 2018 WI 46, ¶ 41, 381 Wis. 2d 349, 365, 912 N.W.2d 35, 43.

Wis. Stat. § 240.10; this section is an extension of Statute of Frauds; it requires that the listing contract be signed by the person who is to pay the commission. It does not indicate which of multiple owners must sign the contract, nor apply to the question of whether or not a sale must be consummated. Winston v. Minkin, 63 Wis.2d 46, 216 N.W.2d 38 (1974).

Sale price or rentals must be specified. Wozny v. Basack, 21 Wis.2d 86, 123 N.W.2d 513 (1963); Buckman v. E. H. Schaefer & Associates, Inc., 50 Wis.2d 755, 185 N.W.2d 328 (1971).

"Able to purchase" in a situation where the buyer must borrow means that a mortgagee or other lender must have made commitment to loan. Peter M. Chalik & Associates v. Hermes, 56 Wis.2d 151, 201 N.W.2d 514 (1972).

At time of rejection, the seller must specify insubstantial variances in order to avoid paying the commission. Libowitz v. Lake Nursing Home, Inc., 35 Wis.2d 74, 150 N.W.2d 439 (1967).

For damages in this situation, see Wis JI-Civil 3740.

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3088 REAL ESTATE LISTING CONTRACT: TERMINATION FOR CAUSE

A real estate broker employed by a seller under a real estate listing contract is bound to exercise reasonable care and skill. The broker must exert himself or herself with reasonable diligence in endeavoring to make a sale of the property to the best advantage of the seller. The seller is entitled to the benefit of the broker's skill, knowledge, and best judgment in effecting a sale of the property.

A real estate broker's failure to perform his or her duty, or negligence, or misconduct on the broker's part, may constitute cause which would justify termination by the seller of the listing contract.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

12 Am. Jur. 2d § 96.

For damages in this situation, see Wis JI-Civil 3740.

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3090 REAL ESTATE LISTING CONTRACT: BROKER'S COMMISSION ON SALE SUBSEQUENT TO EXPIRATION OF CONTRACT CONTAINING "EXTENSION" CLAUSE

The real estate listing contract involved in this case provided that the contract was to be in effect until _____, and, in addition, provided that if a sale was made during an extended period of _____ months after that date, to a person with whom the broker had negotiated during the term of the contract, then the broker was entitled to the commission.

A broker who works under such a contract is entitled to a commission if two conditions are satisfied; first, if a sale is made during the extended period of the contract to a person (called the actual purchaser) with whom the broker dealt during the original stated term of the contract; second, if the dealing went to a point where that person could be considered a likely purchaser before the original period of the contract expired.

In determining whether the actual purchaser in this case was a likely purchaser in the meaning of the law, you should consider whether under all the facts and circumstances it was probable that as a result of the broker's activity the purchaser would make an acceptable offer during the extended period.

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Jessup v. LaPin, 35 Wis.2d 186, 150 N.W.2d 342 (1967); 51 A.L.R.2d 1149, 1158, 1181.

This instruction is to be given only if the real estate listing contract contained a subsequent sale "extension" clause and if the sale or exchange was made within the terms of such extension of seller's liability to broker.

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3094 RESIDENTIAL EVICTION: POSSESSION OF PREMISES[1]

The plaintiff, who has also been referred to as landlord,[2] claims that the defendant was (his) (her) (its) tenant at a property located at (address) and that the defendant breached their lease agreement[3] by [failing to pay rent] [committing waste] [breaching a condition of the lease by (insert reason)]. The plaintiff is asking that the defendant(s) be evicted and possession of (address) be returned to the plaintiff. The defendant(s) deny(ies) that (he) (she) (they) should be evicted and that [(he) (she) (they)] [(is) (are)] entitled to remain in possession of (address) as [(he) (she) (they) did timely pay the rent], [the alleged (breach) (waste) did not occur] [the (breach) (waste) was corrected within the time specified in the notice].[4]

In order for you to find in favor of the plaintiff/landlord, the plaintiff/landlord must prove by the greater weight of the credible evidence, to a reasonable certainty, all of the following;

1. that there was a valid lease with the defendant(s),
2. that the defendant(s) breached the lease by [failing to pay rent] [committing waste] [breaching a condition of the lease by (insert reason)], and
3. that the defendant(s) (was) (were) given the required written notice and did not comply with the notice.

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Lease

The plaintiff must first prove by the greater weight of the credible evidence, to a reasonable certainty, that a lease existed. A lease is an agreement in which one party, the landlord, transfers the right to the possession of real property to another person for a definite period of time. [You will hear testimony from the parties regarding the issue of the lease for the property at (address)]. The plaintiff has the burden to prove to you by the greater weight of the credible evidence that the lease existed and that the defendant breached one or more conditions of the lease agreement by [not paying rent when due/committing waste/breach of condition of lease].

WRITTEN NOTICE

The plaintiff must also prove by the greater weight of the credible evidence, to a reasonable certainty, that proper notice was given to the defendant(s). Before a landlord can evict a tenant for a breach of a lease agreement a landlord is obligated by law to give their tenant written notice. The landlord must give notice by one of the following methods: [choose applicable provisions]

a. By giving a copy of the notice personally to the tenant or by leaving a copy at the tenant's usual place of abode in the presence of some competent member of the tenant's family at least 14 years of age, who is informed of the contents of the notice.

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b. By leaving a copy with any competent person apparently in charge of the rented premises or occupying the premises or a part thereof, and by mailing a copy by regular or other mail to the tenant's last known address.

c. If notice cannot be given by either (a) or (b) with reasonable diligence, by affixing a copy of the notice in a conspicuous place on the rented premises where it can be conveniently read and by mailing a copy by regular or other mail to the tenant's last known address.

d. By mailing a copy of the notice by registered or certified mail to the tenant at the tenant's last-known address.

e. By serving the tenant as prescribed in s. 801.11 for service of a summons.

Actual Notice Wis. Stat. 704.21(5) (if applicable)[5]

If notice is not properly given by one of the methods specified in this section, but is actually received by the other party, the notice is deemed to be properly given; but the burden is upon the party alleging actual receipt to prove the fact by clear and convincing evidence.

Type of Notice

In this case the landlord was required to provide the following notice;

[choose applicable provision]:

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A. **Month-to-Month & Week-to-Week Tenancies**[6]**:**

1. **Failure to pay rent: 5-Day:** If (a month-to-month) (a week-to-week) tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and the tenant fails to pay.

2. **Failure to pay rent/Waste: 14-Day:** A month-to-month tenancy is terminated if the landlord, while the tenant is in default in payment of rent, commits waste, or breaches the lease other than for payment of rent, gives the tenant notice requiring the tenant to vacate on or before a date at least 14 days after the notice is given.[7]

3. **Waste: 5-Day:** If a month-to-month tenant commits waste or breaches the lease other than for payment of rent, the tenancy is terminated if the landlord gives the tenant a notice that requires the tenant to repair or fix the damage or vacate the premises no later than a date at least 5 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

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4. **[Drug/Gang House notification by law enforcement: see §704.17(1p)(c) – 5 day notice]**

B. One Year Or Less & Year-To-Year Tenancies[8]:

1. **Failure to pay rent: 5-Day:** If (a one year or less) (a year-to-year) tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and the tenant fails to pay accordingly.

2. **Failure to pay rent: 14-Day:** If a tenant within the prior year has been given written notice of failure to pay rent and the tenant fails to pay a subsequent installment of rent on time the landlord may terminate the tenancy by giving the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

3. **Waste: 5-Day:** If (a one year or less) (a year-to-year) tenant commits waste or breaches the lease other than for payment of rent, the tenancy is terminated if the landlord gives the tenant a notice that requires the tenant to repair or fix the damage or vacate the premises no later than a date at least 5 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable

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diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

4. **Waste: 14-Day:** If a tenant within the prior year has been given written notice of committing waste or a breach of the lease other than for payment of rent and the tenant again commits waste or breaches the same or any other condition of the lease other than for payment of rent, the landlord may terminate the tenancy by giving the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

5. **[Drug/Gang House notification by law enforcement: see § 704.17(2)(c) – 5 day notice]**

C. Lease For More Than One Year[9]:

1. **Failure to pay rent, waste, or other breach: 30-Day:** If a tenant under a lease for more than one year fails to pay rent when due, or commits waste or breaches the lease, the tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent, repair the waste, or otherwise comply with the lease on or before a date at least 30 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

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2. **[Drug/Gang House/Criminal activity notification by law enforcement: see § 704.17(2)(c) & (3m) – 5-day notice]**

Failure to Comply With Notice

If you find that the plaintiff gave valid notice to the defendant(s), then the plaintiff must prove to you that the defendant(s) did not comply with the notice as: [give as appropriate from evidence received]

A. Failure to pay rent: Defendant(s) failed to pay the rent within 5 days after the 5-day notice was received,

B. Waste or Breach: Defendant(s) did not within 5 days after notice was received [promptly take reasonable steps to remedy the breach], [proceed with reasonable diligence to repair the damage or correct the breach], [make a bona fide and reasonable offer to pay the landlord all damages for the breach].

[NOTE: Valid 14-day notices have no remedy for defendant but may require an inquiry on the special verdict as to whether the tenant, within the prior year, had been given written notice of a prior breach]

SPECIAL VERDICT: Eviction: Possession of Premises

We, the jury find as follows:

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[If the lease period is (week-to-week) (month-to-month), use the following special verdict when 5-day notice at issue]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes_____ No

Question 2: Did [the landlord] properly provide a valid 5-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes_____ No

Question 3: Did [the tenant(s)] pay the full amount of the past due rent within the 5-day notice period?

Answer: _____ Yes_____ No

[If the lease period is month-to-month, use the following special verdict when 5-day notice for waste or other breach at issue]:

Question 1: As of [date], had the [tenant(s)] committed waste or otherwise breached the lease?

Answer: _____ Yes_____ No

Question 2: Did [the landlord] properly provide a valid 5-day notice requiring [the tenant(s)] to repair or fix the damage or other breach or vacate the premises?

Answer: _____ Yes_____ No

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Question 3: Did [the tenant(s)] comply with the notice by [promptly taking reasonable steps to remedy the breach and proceeding with reasonable diligence] [making a bona fide and reasonable offer to pay the landlord all damages for the breach within the 5-day notice period]?

Answer: _____ Yes_____ No

[If the lease period is month-to-month, use the following special verdict when 14-day notice is alleged]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

[Alternate Question 1]: As of [date of waste or other breach], did [the tenant(s) (commit waste) (breach the lease)]?

Answer: _____ Yes_____ No

Question 2: Did [the landlord] properly provide a 14-day notice requiring [the tenant(s)] to vacate the premises?

Answer: _____ Yes_____ No

[If the lease period is year-to-year or one year or less use the following special verdict]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes_____ No

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Question 2: Did [the landlord] properly provide a 5-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes_____ No

Question 3: Did [the tenant(s)] fail to pay the full amount of the unpaid rent within the 5-day notice period?

Answer: _____ Yes_____ No

[use if a 14-day notice has been given alleging a prior notice within a year]:

Question 1: Within the prior year had [the tenant(s)] failed to pay rent when due and been given prior written notice to pay rent or vacate the premises?

Answer: _____ Yes_____ No

Question 2: Did [the landlord] properly provide a 14-day notice requiring [the tenant(s)] to vacate?

Answer: _____ Yes_____ No

[If the lease period is for more than one year use the following special verdict]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes_____ No

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Question 2: Did [the landlord] properly provide a 30-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] fail to pay the full amount of the unpaid rent within the 30-day notice period?

Answer: _____ Yes _____ No

Dated _____

Presiding Juror:

_____

Dissenting Juror:

Identify each answer that you do not agree with and sign your name.

_____: as to question(s) # _____

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Alternate Special Verdict

Special Verdict Question No. 1:

Who Is Entitled To Possession of (address): (circle party entitled to possession of the premises):

Plaintiff/Landlord or Defendant/Tenant

Dated this __ day of _____, 20____.

_____

Foreperson

Dissenting Juror:

Identify each answer that you do not agree with and sign your name.

_____: as to question(s) # _____

COMMENT

The instruction and comment were approved by the Committee in 2019. An editorial correction was made to the comment in 2020.

This instruction is created as a result of § 799.20(4) which requires that in a "residential eviction action" a jury or court trial on the issue of "possession of the premises" must be held within 30 days of the return date if the defendant "claims a defense to the action." This instruction addresses the instructions and special verdict required for deciding the eviction; i.e. who is entitled to the possession of the premises.

The reader should be aware that there is a discrepancy in the statutes; as noted § 799.20(4) requires a trial if a defendant "claims a defense" to the eviction action at the return date, whereas § 799.206(3) states that in an eviction action if a party at the return date "raises valid legal grounds for a contest," then the matter is to be scheduled for a "hearing" before a judge (not a court commissioner) within 30 days of the return date. We leave to you the significance, if any, regarding the competing language in the above statutes.

Residential Rental Practices are regulated in Wisconsin in Chapter 134 ATCP, Wis. Admin. Code and the reader should modify any instructions per the code provisions. Substantive statutes regarding

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Landlord and Tenant are found in Chap. 704 Wis. Stats., and procedural rules regarding eviction actions are found in Chap. 799 Wis. Stats., (Small Claims).

1. § 799.20(4).
2. ATCP 134.02(5)
3. ATCP 134.02(6) (10) & §704.01(1)
4. ATCP 134.02(9)
5. § 704.21(5)
6. § 704.17(1p)
7. § 704.17(1p)(a) & §704.17(b)(2)
8. § 704.17(2)
9. § 704.17(3)

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3095 LANDLORD-TENANT: CONSTRUCTIVE EVICTION

Constructive eviction consists of any disturbance of the tenant's possession of property by the landlord (or someone acting under the landlord's authority) which renders the premises unfit for occupancy for the purposes for which they were leased or which deprives the tenant of the beneficial enjoyment of the premises if:

- the landlord is given notice of the disturbance of possession and fails to remedy the disturbance within a reasonable time;
- the tenant abandons the premises within a reasonable time of the disturbance of possession; and
- the disturbance of possession caused the tenant to abandon the premises.

The disturbance must be substantial and of such duration that is can be said that the tenant has been deprived of the full use and enjoyment of the leased property for a material period of time.

SPECIAL VERDICT

Was (plaintiff) constructively evicted?

Answer: _____
Yes or No

COMMENT

This instruction and comment were originally approved in 1987 and revised in 2012.

Whenever a constructive eviction takes place, the tenant is released from the obligations under the lease to pay rent accruing after the eviction. First Wisconsin Trust Co. v. L. Wiemann Co., 93 Wis.2d 258, 268, 286 N.W.2d 360, 365 (1980). In First Wisconsin, the court explicitly required that the tenant abandon the premises for there to be a constructive eviction.

Wis. Stat. § 704.07, deals with the physical condition of property, rather than a disturbance of tenant's possession by the landlord, but likewise allows a tenant to leave the premises and not be responsible for further rent if the premises become untenantable. The statute forbids a tenant from withholding rent in full if the tenant maintains possession of the premises and, instead, provides for an abatement of rent.

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